

## EXHIBIT O

Page 1

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 08-99000-smb

4 - - - - - x

5 In the Matter of:

6 BERNARD L. MADOFF,

7 Debtor.

8 - - - - - x

9 Adv. Case No. 09-01503-smb

10 - - - - - x

11 IRVING H. PICARD, Trustee for the Liquidation of Bernard L.

12 Madoff Investment Securities LLC,

13 Plaintiff,

14 v.

15 MADOFF et al.,

16 Defendants.

17 - - - - - x

18 Adv. Case No. 08-01789-smb

19 - - - - - x

20 SECURITIES INVESTOR PROTECTION CORPORATION

21 Plaintiff,

22 v.

23 BERNARD L. MADOFF INVESTMENT SECURITIES, LLC et al.,

24 Defendants.

25 - - - - - x

Page 2

1 Adv. Case No. 10-04891-smb

2 - - - - - x

3 IRVING H. PICARD, Trustee for the Liquidation of Bernard L.

4 Madoff Investment Securities LLC,

5 Plaintiff,

6 v.

7 THE ROBERT AUERBACH REVOCABLE TRUST, THE JOYCE C. AUERBACH

8 REVOCABLE TRUST, ROBERT AUERBACH, individually, and

9 JOYCE C. AUERBACH, individually, as Trustee of the Robert

10 Auerbach Revocable Trust, and as Trustee of the Joyce C.

11 Auerbach Revocable Trust,

12 Defendants.

13 - - - - - x

14 Adv. Case No. 10-04918-smb

15 - - - - - x

16 IRVING H. PICARD, Trustee for the Liquidation of Bernard L.

17 Madoff Investment Securities LLC,

18 Plaintiff,

19 v.

20 Ellen Bernfeld,

21 Defendant.

22 - - - - - x

23

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1 - - - - - x

2 Adv. Case No. 10-04283-smb

3 - - - - - x

4 IRVING H. PICARD, Trustee for the Liquidation of Bernard L.

5 Madoff Investment Securities LLC,

6 Plaintiff,

7 v.

8 STEVEN MENDELOW et al,

9 Defendants.

10 - - - - - x

11 U.S. Bankruptcy Court

12 One Bowling Green

13 New York, NY 10004

14 February 24, 2016

15 10:16 AM

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23 B E F O R E :

24 HON STUART M. BERNSTEIN

25 U.S. BANKRUPTCY JUDGE

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1      Hearing re: Chambers Conference, Adv. Case No. 09-01503-smb  
2  
3      Hearing re: Motion to Allow Customer Claim of Aaron  
4      Blecker, Adv. Case No. 08-01789-smb  
5  
6      Hearing re: Trustees Motion and Memorandum to Affirm His  
7      Determinations Denying Claims of Claimants Holding Interests  
8      in Black River Associates LP, MOT Family Investors, LP,  
9      Rothschild Family Partnership, and Ostrin Family  
10     Partnership, Adv. Case No. 08-01789-smb  
11  
12     Hearing re: Final Pre-Trial Conference, Adv. Case No. 10-  
13     04891-smb  
14  
15     Hearing re: Discovery Conference Pursuant to Local Bankr.  
16     R. 7007-1(b), Adv. Case No. 10-04918 (also applies to Adv.  
17     P. Nos. 10-5143 & 10-4841)  
18  
19     Hearing re: Trustee's Motion for Leave to Amend, Adv. Case  
20     No. 10-04283-smb  
21  
22     Hearing re: Discovery conference pursuant to Local Rule  
23     Bankruptcy 7007-1(b), Adv. Case No. 10-04283-smb  
24  
25     Transcribed by: Sonya Ledanski Hyde

Page 5

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1 P R O C E E D I N G S

2 THE COURT: Go ahead.

3 MS. CHAITMAN: Good morning, Your Honor. Helen  
4 Davis Chairman on behalf of Aaron Blecker. Mr. Blecker is  
5 104 years old and he has been waiting since 2009 for the  
6 trustee to fulfill his statutory obligation to pay SIPC  
7 insurance.

8 We know from Bernard Madoff's declaration what we  
9 know from basic common sense, an investment advisor does not  
10 send a customer a check unless the customer asks for the  
11 check and does so in writing. Mr. Madoff attests to the  
12 fact that he kept all such records and indeed the trustee  
13 has such records and has produced letters from customers  
14 asking for profit withdrawals --

15 THE COURT: Can I ask you a question? Are you  
16 asking for a hearing or are you asking for determination  
17 today that he's entitled to payment of his claim.

18 MS. CHAITMAN: I think that there's no factual  
19 dispute in the record. There is not a single issue in  
20 dispute because, number one, while the trustee says that Mr.  
21 Madoff is not credible, he hasn't put in an affidavit from -  
22 -

23 THE COURT: But Mr. Madoff's affidavit, even by a  
24 creditor is hearsay. How can I grant a motion like that on  
25 a hearsay affidavit?

1 MS. CHAITMAN: Mr. Picard has letters that  
2 customers have written asking for withdrawals. There is no  
3 evidence that Mr. Blecker ever asked for a withdrawal. You  
4 have to --

5 THE COURT: Can I ask you a question? One thing I  
6 can't figure out the trustee has raised. He testified at  
7 his deposition, which I read, that he never took any money  
8 out of this account because it was such a great investment.  
9 He leaves the money in there for between I think 15 and 5  
10 years depending on -- and then at the end of the day he  
11 pulls out \$206,000. He could have gotten more in a savings  
12 account at today's rates.

13 MS. CHAITMAN: Well, it's very interesting, Your  
14 Honor, because when the trustee raised that issue I then  
15 happened to look at the latest expert report that the  
16 trustee has submitted on the assumption that he loses and  
17 that Your Honor holds that the profit withdrawals, that  
18 there's no documentary evidence for such as Blecker have to  
19 be paid.

20 And in that report, the trustee's expert  
21 calculates that the amount due to Mr. Blecker on this very  
22 account is \$558,868.

23 THE COURT: I thought on this account, the 22  
24 account everything was transferred out.

25 MS. CHAITMAN: No, it's BO56. But they were all -

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1 - they were transferred between them.

2 THE COURT: So the expert says that he's entitled  
3 to \$586,000?

4 MS. CHAITMAN: \$558,868. So that I think explains  
5 the whole thing. Now, we don't have access to those  
6 records. But the things that are not in dispute, Your  
7 Honor, and they won't be in dispute, there is not a single  
8 piece of paper in the trustee's possession which indicates  
9 that Mr. Blecker ever requested a withdrawal.

10 THE COURT: I understand that. But according to  
11 the expert, trustee's expert report, if you went back 10  
12 years -- and I realize Mr. Blecker's so-called profit  
13 withdrawals were before then, the expert has been able to  
14 correlate nearly 100% that every profit withdrawal was  
15 documented by other evidence that indicates that it was  
16 actually in some sort of withdrawal distribution.

17 And I guess the trustee is asking me to  
18 extrapolate those findings back to the beginning when maybe  
19 the records aren't that good or maybe there are no records,  
20 I don't know, or maybe the records -- there were records  
21 that were lost and say that every time you see profit  
22 withdrawal it's a withdrawal. Why is it that some evidence  
23 creates an issue effect?

24 MS. CHAITMAN: It's not evidence and I'll tell you  
25 why. If you look at that same expert report, what the

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1 expert said was if I take the period only from before  
2 December 1998 when there was a different trading strategy,  
3 this phenomenon of Check AT&T \$1314.03, that phenomenon  
4 stopped in 1998. There were no profit withdrawals of that  
5 kind.

6 What the trustee's expert did was say, well, we  
7 have different kinds of withdrawals. Yes, if a customer  
8 writes a letter and says please send me \$10,000 a month,  
9 those correlated to checks to the customer. But in the  
10 period prior to 1998 before they had the bank records, that  
11 very trustee said all I can do is confirm 50%. With respect  
12 to Blecker I can't confirm a single one. And of that 50%,  
13 Your Honor, the report has this many charts for each  
14 account.

15 THE COURT: Counsel is showing me about six  
16 inches.

17 MS. CHAITMAN: Oh, sorry. Thank you. And of  
18 that, three and a half inches is normally (indiscernible).  
19 So of the pre-1998 profit withdrawals, more than half of  
20 them are Madoff's co-conspirator with whom Madoff was  
21 exchanging billions of dollars on a daily basis. So  
22 ultimately, there's essentially no evidence that the trustee  
23 has and this -- as I -- you know, from the cases I cited,  
24 Your Honor, you don't establish a fact through a statistical  
25 analysis because we all know, and it's proven by what

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1       happened here just as Your Honor misunderstood the report,  
2       the statistician who's paid to do something can play with  
3       numbers and come up with everything.

4                     THE COURT: (indiscernible) expert witness.

5                     MS. CHAITMAN: I agree with you. We don't need an  
6       expert witness. This is not a question of expert testimony.  
7       Mr. Blecker was deposed. The trustee had every opportunity  
8       to challenge him. He was 102 at the time he was deposed.  
9       The trustee couldn't shake him. We have no evidence  
10      whatsoever.

11                  We have the fact that right after this trading  
12      strategy -- God knows what it was -- there was never a  
13      withdrawal by Mr. Blecker even though he was aging. So all  
14      of the evidence that can ever be adduced proves that he  
15      never took out any money and the trustee can't -- there's  
16      nothing in SIPC which allows a trustee to deny to someone  
17      where the evidence and the books and records prove that the  
18      customer never took a withdrawal.

19                  THE COURT: Thank you.

20                  MS. BROWN: Your Honor, Seanna Brown on behalf of  
21      the trustee. Your Honor, I think Ms. Chaitman's argument  
22      demonstrates why this court should adhere to the profit  
23      withdrawal schedule that ordered last June.

24                  She's arguing the merits of our expert reports and  
25      what factual disputes exist. And the court should evaluate

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1 those arguments on the basis of a full record, which is  
2 precisely what the profit withdrawals order.

3 THE COURT: Can I ask a question?

4 MS. BROWN: Yes.

5 THE COURT: You're going through this exercise of  
6 getting experts. Has anyone taken the deposition of a  
7 person who worked the Madoff Securities and might know what  
8 these profit withdrawals mean?

9 MS. BROWN: We have not taken any depositions. We  
10 have evaluated the books and records of Madoff, including  
11 the house -- excuse me, the BLMIS manual that relates to the  
12 computer system through which these transactions were  
13 recorded. And that brings me to one point I do want to  
14 emphasize.

15 THE COURT: What does it show you about profit  
16 withdrawals?

17 MS. BROWN: So in that manual which is referenced  
18 in both our brief and in the expert reports, it talks about  
19 profit withdrawals, cash withdrawals and other types of  
20 debits and credits and that are in the system. And profit  
21 withdrawals and cash withdrawals are both recorded as  
22 debits, which is consistent with what's reflected on the  
23 customer statements because these transactions,  
24 contemporaneously, not after the fact, are treated as  
25 deductions to the customer's reported equity balance at the

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1 time.

2 And that's one of the arguments we'd like to make  
3 at our full hearing -- and I'm happy to say it now -- but  
4 none of these -- all of these --

5 THE COURT: Why don't you tell me why there's a  
6 factual issue why this can't be decided on the evidence  
7 that's been produced by Mr. Blecker.

8 MS. BROWN: Okay, so there's several things. For  
9 one --

10 THE COURT: I mean, it's sort of been presented as  
11 a motion for summary judgment even though it isn't.

12 MS. BROWN: Sure. So Ms. Chaitman just referenced  
13 that Mr. Blecker was entitled to a certain amount. There is  
14 no facts on the record as to what that amount is and we  
15 should be allowed to develop those facts on a fuller record.

16 The other thing I want to point out is she point  
17 to the fact that there's nothing SIPA that permits the  
18 trustee to do this and that's not true. Under 78fff-IIb,  
19 net equity claims are only paid if they're ascertainable  
20 from the books and records of the debtor. We have, you  
21 know, a 30-year, 30 to 40-year fraud here and we have  
22 voluminous records.

23 So what our experts did, the trustee hired  
24 forensic accounting experts to assist him in reconstructing  
25 the books and records. Once they were complete doing their

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1 analysis and their forensic accounting work, they reached  
2 their opinion which we want to present to you as part of the  
3 profit withdrawal litigation and on the basis of those  
4 opinions the trustee met his statutory obligations to  
5 determine net equity in a certain manner.

6 It's up to the court to determine whether that  
7 manner is consistent with SIPA and how that calculation  
8 should be applied in any one case. But that -- those issues  
9 should be developed only on a full record after the court  
10 has heard all of the evidence and argument and not on a one-  
11 off claims motion with no support.

12 THE COURT: But the evidence is that as to Mr.  
13 Blecker, there's no backup to support the argument that the  
14 PW (indiscernible).

15 MS. BROWN: We disagree with that. We disagree  
16 with that for several reasons.

17 THE COURT: What's the evidence other than the  
18 extrapolation other than the expert findings to the pre-1998  
19 period?

20 MS. BROWN: Well, we think that evidence is  
21 sufficient and we think that we should be entitled to  
22 present the full record.

23 THE COURT: I understand that part.

24 MS. BROWN: But in addition to that, MR. Blecker  
25 received contemporaneous statements. The customer

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1 statements are reliable for the purposes of the cash-in and  
2 cash-out transactions, including the profit withdrawal  
3 transactions. Mr. Blecker -- so as Your Honor pointed out  
4 earlier today, Mr. Blecker invested \$200,000. Eleven years  
5 later, the only amount that he had to transfer was \$206,000  
6 according to this statement. That's all in the books and  
7 records of the debtor.

8 There's no explanation from Mr. Blecker as to  
9 where --

10 THE COURT: There were no fictitious profits in  
11 that account?

12 MS. BROWN: There were fictitious profits that  
13 were withdrawn and then some portion of that fictitious  
14 profits was transferred to the other account. So I think  
15 there are -- we also have several documents that are year-  
16 end BLMIS documents. And what those documents show is that  
17 the profit withdrawal transactions were reductions to his  
18 net equity.

19 We also will rely upon the House 17 manual that I  
20 referenced earlier, which is another record of the debtor.  
21 And I'd like to point out that Mr. Blecker is also relying  
22 upon the statements for purposes of his deposits. He  
23 doesn't -- you know, no one has records that go back 30  
24 years for purposes of their deposits. And the trustee is  
25 relying on the cash transactions of those statements to

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1 determine net equity, which is precisely what all of the  
2 customers do for purposes of establishing their deposits.

3 Your Honor, if I may, I'd like to make one other  
4 point with regard to Blecker.

5 THE COURT: Go ahead.

6 MS. BROWN: It's not on this particular issue, so  
7 do you have any other questions about today?

8 THE COURT: No.

9 MS. BROWN: Okay. So the last point I want to  
10 make today that even if the court was inclined to go forward  
11 on Mr. Blecker's claim today, he filed a claim of motion  
12 with regard to account 1B0022. The last transaction in that  
13 account is an inner account transfer to account number  
14 1B0156.

15 As Your Honor is aware Engelmayer recently  
16 affirmed this court's opinion on the inter account transfer  
17 issue. And just last week Mr. Blecker filed a notice of  
18 appeal to the 2nd Circuit on that issue. So even if the  
19 court was to hear Mr. Blecker's claim dispute today, there  
20 can be no final order that can issue because that -- Mr.  
21 Blecker's claim is involving an appear to the 2nd Circuit.

22 THE COURT: I thought that there was no inter  
23 account transfer into this 22 account, right?

24 MS. BROWN: There is -- not. There is --

25 THE COURT: It's a cash deposit and I thought your

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1 argument was even if he had money in the account it was  
2 transferred out to an inter account transfer.

3 MS. BROWN: It was. So the value of this --

4 THE COURT: -- under any set of circumstances.

5 MS. BROWN: That's correct.

6 THE COURT: Yeah, I understand that.

7 MS. BROWN: I suppose of the inter account  
8 transfer decision were to come down a different way from the  
9 2nd Circuit --

10 THE COURT: But it wouldn't matter because there  
11 was never an inter account transfer into this account.

12 Right?

13 MS. BROWN: There was not one into B22.

14 THE COURT: You agree that this account was funded  
15 with cash.

16 MS. BROWN: We do agree with that.

17 THE COURT: Okay, so there was never an inter  
18 account transfer and then he transferred out whatever he  
19 had.

20 MS. BROWN: So you're right. So the value of this  
21 account is zero under any calculation.

22 THE COURT: -- transferred \$206,000 or \$260,000  
23 depending on --

24 MS. BROWN: You're right.

25 THE COURT: Right, all right.

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1 MS. BROWN: Thank you, Your Honor.

2 THE COURT: All right. Let me hear from SIPC and  
3 then I'll hear from you, Ms. Chaitman.

4 MR. BELL: Your Honor, there are two orders that  
5 pertain here. One is the claims procedure order with regard  
6 to Mr. Blecker's claim that was entered on December 23,  
7 2008. And there is the order --

8 THE COURT: Is that the one that requires the  
9 trustee (indiscernible) request to hearing?

10 MR. BELL: Well, it requires the trustee to make  
11 determinations as to claims and then set a hearing.

12 THE COURT: Right, as opposed to properly request  
13 a hearing.

14 MR. BELL: Exactly.

15 THE COURT: Okay.

16 MR. BELL: But I'll address that in a minute. And  
17 the second order is this court's order on June 25th, okay.

18 THE COURT: Yeah, nobody's mentioned that one.

19 MR. BELL: So let's address the first one first,  
20 promptly. Well, in this case we're dealing with customer  
21 claims and we're dealing with certain issues like net  
22 equity, time-based damages and inter account transfers that  
23 have all been heard before this court and appeals have been  
24 taken by numerous customers and I would imagine at some  
25 points in time Mr. Blecker was in those because I still

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1 don't have an answer to the question I asked this court four  
2 weeks ago from Ms. Chaitman who she represents on the  
3 customer objections. So I can't address that clearly to the  
4 court.

5 But clearly we have situations here where you rely  
6 on what the customer submits. Last night at 5:18 I received  
7 a copy of Mr. Blecker's answers to the requests for  
8 admission and he admitted he got the statements, including  
9 the statement where we have the purported profit withdrawal.

10 And as this court knows from the briefings that  
11 have been filed by the trustee and SIPC in July and again in  
12 January, those statements are under New York law 10-day  
13 objection period and there is no objection contemporaneously  
14 found by that.

15 THE COURT: So what does that mean with respect to  
16 all the fictitious profits in the statements?

17 MR. BELL: It means the person has accepted it at  
18 contemporaneous on that time, not when he's 102 or 104 but  
19 back in the day which is back in the last century, so he's  
20 probably 88. You know, I'm not going to talk about his  
21 capacity but clearly we have an issue that's much more  
22 complex.

23 This court set a procedure where we are almost  
24 finished discover in less than three weeks. We have on the  
25 14th of April a brief due from the other side and on the 5th

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1 of May a brief due from us. I think the trustee and SIPC  
2 are amenable to moving that schedule up if that would help  
3 and then you would have a full record.

4 THE COURT: I think it's going to have to be an  
5 evidentiary hearing in this. This isn't going to be  
6 resolved on the papers. I'm going to have to hear the  
7 experts.

8 MR. BELL: Exactly.

9 THE COURT: The other side's going to be entitled  
10 to cross examine the experts. We need to think about some  
11 sort of an omnibus procedure which would be a trial rather  
12 than papers.

13 MR. BELL: And that's what we wrote in our  
14 response to Ms. Chaitman's motion. This is a complex issue  
15 where it goes through a whole bunch of people. Back in the  
16 day when this thing started, there were over 600 and  
17 something potential customers. We're down to 53 or 54 as  
18 the counsel have looked at this and we have narrowed the  
19 issue for this court. Who knows what we will have when we  
20 get to the hearing date?

21 So I do think and I have total sympathy of every  
22 victim of Bernie Madoff, particularly this 104-year-old man  
23 but the rule of law has to pertain here, Your Honor, with  
24 regard to this and we should stick to the procedures that  
25 this court has set in both of those orders. Thank you, Your

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1 Honor.

2 THE COURT: Thank you.

3 MS. CHAITMAN: Judge, I know how thorough you are.  
4 I just ask you to do one thing before you rule. Look at the  
5 statements that Mr. Blecker received.

6 THE COURT: And I was reminded of something, Ms.  
7 Chaitman. The motion was brought with respect to the 22  
8 account and everybody has to agree that there's nothing in  
9 that account.

10 MS. CHAITMAN: No. Can I just finish on this  
11 other part, first?

12 THE COURT: Go ahead. I'm sorry.

13 MS. CHAITMAN: Okay. I just -- if you'll forgive  
14 me. Mr. Blecker received the statements. Of course we  
15 never denied he received the statements. I want you to look  
16 at the statement. There are samples of them in the records.  
17 It says whatever the company is, Check AT&T.

18 THE COURT: Does it say Check AT&T?

19 MS. CHAITMAN: It says Check and then the name of  
20 a company, right? It doesn't say check to customer, check  
21 Aaron Blecker. It says Check AT&T. Now, when there are  
22 withdrawals to the customer it says check to the customer.

23 THE COURT: Is your theory that that's a  
24 fictitious entry?

25 MS. CHAITMAN: No -- well, who knows?

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1           THE COURT: But that's the point. In other words,  
2 he gets the statement. He sees a debit.

3           MS. CHAITMAN: And he also sees that he has a  
4 purchase into his account. Yes, there's a debit --

5           THE COURT: But that's why I'm asking you whether  
6 you're saying that's a fictitious entry or not.

7           MS. CHAITMAN: There was a purchase into his  
8 account of AT&T stock. Now, whether the stock was actually  
9 purchased, I have no idea. But the point is it wasn't a  
10 debit, which showed a payment to him. It was a debit which  
11 showed that stock was purchased for his account.

12          THE COURT: Well, we don't know what it is. We  
13 don't know what it is.

14          MS. CHAITMAN: But the point is in every one of  
15 those statement, if you look through either that statement  
16 or the next one, you see there's an addition of stock in the  
17 name of the purported payee of the check.

18          THE COURT: But I looked at one of them and the  
19 check, the PW was I think 12 days after the stock was  
20 purchased. That seems like a long time. Why would the  
21 check be issued to the company at that time?

22          MS. CHAITMAN: Judge, if the trustee hasn't gotten  
23 one fact witness who actually was involved with this -- the  
24 point is, Your Honor, there is nothing in the factual record  
25 which suggests that this check was paid to Aaron Blecker.

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1 And, indeed, when I first got involved in representing Mr.  
2 Blecker I said to the trustee give me the fronts and backs  
3 of these checks. How could Mr. Blecker have cashed a check  
4 made out to AT&T? And that was the time at which the time  
5 disclosed that he didn't have the bank records.

6 If it was a check to Mr. Blecker it would have  
7 said check to customer.

8 THE COURT: Okay, now come back to my question.  
9 He was seeking an allowance of the customer claim with  
10 respect to the 22 account. That's what the motion is  
11 seeking.

12 MS. CHAITMAN: Right.

13 THE COURT: And whatever else happened, all of  
14 that money was transferred to another account, so that  
15 account has to be zero under any set of circumstances,  
16 doesn't it?

17 MS. CHAITMAN: Well, no, because if in fact --  
18 well, I don't -- all right, so I guess what you're saying is  
19 that I should have moved with respect to the other account.

20 THE COURT: Well, what I'm saying is you moved  
21 with respect to the 22 account and even if you're right on  
22 everything else, all of that money was transferred, so the  
23 trustee is well within his rights to deny any -- or SIPC's  
24 within its rights not to insure that account.

25 MS. CHAITMAN: You know what, Judge? The man is

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1 104 years old.

2 THE COURT: I understand that.

3 MS. CHAITMAN: The case is -- but it's not a  
4 question of being sympathetic. The statute requires that  
5 claims be paid promptly and, you know, what --

6 THE COURT: Let me ask you a question. It's a  
7 question I've had in my mind. And this may be the  
8 difference between fraudulent transfer actions and these  
9 claims determinations. The statute says that the claim has  
10 to be satisfied to the books and records of the trustee.

11 If the trustee makes a reasonable determination  
12 based on this expert's reports that PW is an actual debit to  
13 the account -- can I look behind that? The question then is  
14 the determination reasonable as opposed to, you know, what  
15 the evidence supports at the trial?

16 MS. CHAITMAN: We don't dispute that it's a debit  
17 to the account but it's a debit to the account because there  
18 was money purportedly paid to the company that issued the  
19 stock. It was a purchase of securities for the account.

20 THE COURT: Well, but if it's a debit to the  
21 account why doesn't it reduce the balance of the account?

22 MS. CHAITMAN: Because these were fictitious.

23 THE COURT: That's what I'm asking you, whether it  
24 was an actual payment or not.

25 MS. CHAITMAN: The trustee is claiming that the

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1 money went to the customer. It did not go to the customer,  
2 so we have to conclude then that it was fictitious. Judge,  
3 we're speculating on --

4 THE COURT: What about the fact that he only pulls  
5 \$206,000 out of this account after 15 years, you know, and  
6 he testified that he never pulled money out because he  
7 thought it was such a great investment?

8 MS. CHAITMAN: I have no way of certifying the  
9 records. As the trustee's own expert has said, these  
10 records are riddled with fraud. We now have the trustee  
11 saying that the amount that Mr. Blecker should be paid to  
12 the successor account for the profit withdrawals and, in  
13 fact there were profit withdrawals from that account but the  
14 expert says the number is \$558,868.

15 So the thing is, Judge, it's not --

16 THE COURT: So you should move with respect to or  
17 seek payment with payment to the accounts that their own  
18 expert says have a certain balance, unless you disagree with  
19 facts.

20 MS. CHAITMAN: I have no basis to disagree with it  
21 but the point is, Judge, I can -- yes, I can make that  
22 motion.

23 THE COURT: Or just ask them. Say your expert  
24 says he's owed this much money, so pay him.

25 MS. CHAITMAN: No, because what the expert says is

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1 if the court accepts that when there's no evidence in  
2 Madoff's records, when there's no letter from the customer,  
3 there's nothing, which suggests -- and that's the case with  
4 Mr. Blecker. The trustee has zero evidence in Mr. Blecker's  
5 records that he ever received that money.

6 Judge, I could make that motion or you could  
7 orally amend my motion to accept it. You know, the man is  
8 104 years old. We're nine years since this money should  
9 have been paid.

10 THE COURT: Can I ask you a question? You  
11 mentioned -- and I understand he's 104 years old. When this  
12 issue first arose, the trustee initially made a motion and  
13 you objected. The trustee withdraws that motion. Then the  
14 trustee doesn't and makes another motion, you don't object  
15 and you write a letter subsequently after the order is  
16 entered saying, yeah, we want to continue to litigate this  
17 PW issue. Why didn't you object? You know, he was 103  
18 then. Why didn't you object and say, look, this is too long  
19 at this time?

20 MS. CHAITMAN: Perhaps I should have. I didn't  
21 think that the court would entertain an objection to the  
22 whole procedure that the trustee was proposing.

23 THE COURT: Well, so why didn't you make the  
24 objection in the first place, cause them to withdraw the  
25 motion?

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1 MS. CHAITMAN: Well, this doesn't just involve Mr.  
2 Blecker, Your Honor. There are scores of --

3 THE COURT: No, but your original objecting memo -  
4 - and I read that yesterday also -- was mostly about Mr.  
5 Blecker and he is 104 years.

6 MS. CHAITMAN: Yes, because he was my client.

7 THE COURT: You have a lot of clients.

8 MS. CHAITMAN: I did. But this is the only one  
9 with whom I was dealing with this issue at that time. I was  
10 not aware of how --

11 THE COURT: I don't understand why you just didn't  
12 object and say, you know, this is my client. It's his main  
13 issue and we just can't wait.

14 MS. CHAITMAN: But Judge, I'm here before you now.  
15 The trustee has had every opportunity to take discovery.

16 THE COURT: But there's a scheduling. My point is  
17 there's a schedule which was approved following the hearing  
18 which you had notice and you didn't object. And the  
19 schedule is still running.

20 MS. CHAITMAN: There's nothing that an expert  
21 could say that would change the facts, Judge.

22 THE COURT: I don't know. All right. Look, I'm  
23 going to deny your motion. First of all, two preliminary  
24 points. You made the motion with respect to account 22 and  
25 as I stated on the record, even if you're right about

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1 everything else, all of the money was transferred out of  
2 account 22 into another account, so that's a zero account  
3 and under any set of circumstances, Mr. Blecker's not  
4 entitled to anything with respect to that account.

5 Secondly, as I have indicated, you agreed to a  
6 procedure, or at least you didn't object to a procedure  
7 although you objected to a similar procedure beforehand.  
8 And we're following that particular procedure.

9 This is one of those omnibus issues. It doesn't  
10 just affect you. If it only affected you we wouldn't have  
11 had the procedure. We just would have had the trial. And  
12 the procedure has to run its course.

13 With respect to the procedure, this is not the  
14 kind of thing that's going to be decided on paper, so you  
15 ought to stop and think about an omnibus type of hearing  
16 where we can hear the experts testify, see them cross  
17 examined and hear counter experts.

18 As I mentioned, I have this issue about if the  
19 trustee makes a determination based on the existing books  
20 and records with the aid of the expert and that  
21 determination is reasonable, doesn't matter if it's not  
22 right. And again, SIPA may be different from a  
23 (indiscernible) transfer action in that respect.

24 But getting to the merits, I'm looking at this  
25 really as a motion to summary judgment as opposed to a, what

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1       essentially you're asking for, judgment on your claim. I  
2       think there are issues of fact. There are issues of fact  
3       relating to the expert reports. I haven't seen the counter  
4       expert reports.

5                 I have a question about the credibility of Mr.  
6       Blecker's statement that he thought this was a great  
7       investment, yet after 15 years he pulls out \$206,000 which  
8       suggests, you know, the kind of interest rate you'd get  
9       today on a checking account.

10               He's getting these statements every month that are  
11       showing debits or whenever these profit withdrawals occur  
12       and he doesn't say anything. I don't know what those are.  
13       With respect to Mr. Madoff's declaration, I look forward to  
14       hearing his testimony on the phone. His declaration doesn't  
15       say what these profit withdrawals are and I would think that  
16       some of you would just want to take the deposition of  
17       somebody who knew what they were. That may be easier said  
18       than done but it seems to me that's the best evidence of  
19       what they are.

20               And for those reasons, I will deny your motion.  
21       You can submit an order. Yes.

22               MS. CHAITMAN: Your Honor, two points.

23               THE COURT: Is this a motion for an argument?

24               MS. CHAITMAN: No, no, it isn't.

25               THE COURT: Okay.

1 MS. CHAITMAN: It isn't. Just two points. We  
2 would like to seek an order from the court -- and I will be  
3 filing a motion -- to depose Mr. Madoff.

4 THE COURT: Why don't you just get it in his  
5 affidavit?

6 MS. CHAITMAN: I'm sorry?

7 THE COURT: You got an affidavit from him.

8 MS. CHAITMAN: Right. But you said you're going  
9 to require testimony.

10 THE COURT: Well, I am going to require testimony.  
11 It's obviously an issue regarding the extrapolation of the  
12 findings of the expert to earlier periods. There's an issue  
13 with the expert report, I suppose. But it sounds to me like  
14 the 10-year period between 1998 to 2008 the expert has  
15 concluded that there's almost a one-to-one correlation  
16 between the profit withdrawals and actual withdrawals.

17 And your issue is really whether that should be  
18 fact (indiscernible) because we don't have that correlation.  
19 And in particular, you have a client -- there's no records  
20 for your client, client has no recollection of withdrawing  
21 any money. But I said, you know, the trustee is asking me  
22 basically to determine on the expert reports on an omnibus  
23 basis that this is what PW means all periods and that just  
24 sounds like a factual issue.

25 MS. CHAITMAN: It is a factual issue. We're going

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1 to move to strike the expert reports, Your Honor. We'd like  
2 to set a schedule to do that because I don't believe the law  
3 permits -- we've cited both 2nd Circuit law and New York  
4 State law and from other circuits and even a Supreme Court  
5 case -- that you can't have expert testimony to establish a  
6 specific fact like this.

7 So we want to move to strike those expert reports,  
8 number one. And number two, Mr. (indiscernible) is dead.  
9 The only person who has personal knowledge of these entries  
10 is Mr. Madoff and we would like to take his deposition so  
11 that the --

12 THE COURT: Well, I'm not going to say you can or  
13 you can't but was he actually keeping these records or --

14 MS. CHAITMAN: He was directing who -- I mean, I  
15 have to assume that he was directing the records and he  
16 certainly was knowledgeable enough to submit that  
17 declaration. So we'd like to submit papers to take his  
18 deposition and we'd like to set up a schedule because we  
19 will be moving to strike the expert reports. We have not --

20 THE COURT: But this is a SIPA case. Can't the  
21 trustee in a SIPA case hire an expert to help them  
22 understand the books and records. You know, he's a trustee.  
23 He inherits all this stuff. And he doesn't know what it  
24 means. How does he find out what it means?

25 MS. CHAITMAN: I'd like to brief the issue, Your

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1 Honor, because I don't think that this is --

2 THE COURT: I mean, I'm not going to tell you you  
3 can't make that motion.

4 MS. CHAITMAN: You want me to just file a motion  
5 or do you want to set a schedule or how would you like to do  
6 that?

7 THE COURT: Well, why don't you -- and you don't  
8 want to wait until the procedure is done?

9 MS. CHAITMAN: Well, the trustee's expert reports  
10 are produced. We are not putting in any expert reports  
11 because I don't believe they're admissible or relevant and  
12 I'd like to move to strike the trustee's expert reports.

13 THE COURT: As I said, I'm not going to tell you  
14 you can't move to strike the expert reports. But it would  
15 be in connection with the entire omnibus procedure.

16 MS. CHAITMAN: Yes, yes.

17 THE COURT: All right.

18 MS. CHAITMAN: Shall I just do that?

19 THE COURT: (indiscernible). Yes.

20 MS. BROWN: It may make sense while you're even  
21 discussing today is an omnibus proceeding to have a trial to  
22 incorporate these types of motions into an actual procedure.

23 THE COURT: Well, but it will shortcut -- what  
24 you're saying is it will shortcut the trial if I strike the  
25 expert report. Then it's going to be -- you know, it's

1 going to be a creditor on creditor basis of claims.

2 MS. BROWN: Right. But I think we should be able  
3 to complete the briefing on all the issues.

4 THE COURT: What's the briefing going to tell me?  
5 At the end of the day it's a question of whether I credit  
6 the expert, isn't it?

7 MS. BROWN: Well, we think that's what should be  
8 developed at trial?

9 THE COURT: What issue are you briefing?

10 MS. BROWN: What issue are we briefing?

11 THE COURT: Yes.

12 MS. BROWN: We are going to brief any additional  
13 issues that were raised in discovery and I think we need to  
14 address this additional legal issue that you've raised today  
15 which is whether or not the court can look behind the  
16 trustee's determination, if that determination is  
17 reasonable.

18 THE COURT: Well, rather than look behind, is that  
19 the sole test?

20 MS. BROWN: Okay.

21 THE COURT: You can make your motion.

22 MS. CHAITMAN: Okay. Thank you.

23 THE COURT: I think it'll shortcut the proceeding.  
24 The motion is granted. I have my question that I would  
25 grant such a motion.

1 MS. CHAITMAN: I know. I have an uphill battle,  
2 but.

3 THE COURT: But go ahead and make your motion.

4 MS. CHAITMAN: Okay, great.

5 THE COURT: All right. Thank you.

6 MR. BELL: Thank you, Your Honor.

7 THE COURT: You can submit an order denying it for  
8 the reasons stating it on the record without setting forth  
9 the reasons since we'll have a transcript. And you can  
10 identify the clients you represent, Ms. Chaitman?

11 MS. CHAITMAN: I can. Oh, you mean all the  
12 clients.

13 THE COURT: Yeah.

14 MS. CHAITMAN: Okay. There are a great number of  
15 them --

16 THE COURT: I understand that.

17 MS. CHAITMAN: Did you want me to write --

18 THE COURT: Didn't you discuss that a conference,  
19 you were supposed to do that?

20 MS. CHAITMAN: No, I did. There's a chart. It's  
21 annexed to all my papers.

22 THE COURT: Yeah, but things have changed.

23 MS. CHAITMAN: No, but this list has been -- do  
24 you want me to file it with the court?

25 THE COURT: Why don't you just tell them? They

1 want to know who you represent.

2 MS. CHAITMAN: But they have it.

3 THE COURT: So give it to them again.

4 MS. CHAITMAN: Okay.

5 THE COURT: All right? It would take less time  
6 than it took setting up this conversation.

7 MS. CHAITMAN: Okay. Thank you.

8 THE COURT: All right. Thank you. The next  
9 motion is the motion to affirm the trustee's determination  
10 denying customer status to a group of investors and I guess  
11 four or five different partnerships. I received the  
12 certificate of no objection. Is there anyone here today who  
13 wants to object to relief sought by the trustee? All right.  
14 The motion will be granted. I've reviewed the papers. It  
15 looks like many similar cases involved investors in an  
16 entity then turned invested in BLMIS.

17 In those cases, the customers admit through  
18 (indiscernible) sponsored a request for admissions that they  
19 weren't customers and I'll affirm the trustee's  
20 determination. You can submit an order. Thank you.

21 MAN: Thank you, Your Honor.

22 THE COURT: Auerbach.

23 MR. HUNT: Your Honor, Dean Hunt for the trustee.  
24 This case has completed discovery. Expert reports have been  
25 completed. We've mediated the case. That was unsuccessful

1 and the case is ready for trial.

2 THE COURT: Okay. So I need a pretrial order.

3 MR. HUNT: Okay, Your Honor. Your Honor, with  
4 respect to that, we believe that we will submit the  
5 majority, if the court permits, the majority of our direct  
6 testimony by declaration. We have discussed that with  
7 defense counsel.

8 THE COURT: Well, I'd like to know what are the  
9 disputed issues of fact, for instance in (indiscernible),  
10 everything was stipulated to and the trial lasted ten  
11 minutes. And that was an effective way of doing it.

12 MR. HUNT: Yeah, we think we're pretty close to  
13 that here on our side.

14 THE COURT: That's really what I'm looking for.  
15 So I'm not sure I want a pretrial order. If you want to  
16 submit -- you may not even need testimony is what I'm saying  
17 depending on what the stipulation of fact says. But I don't  
18 have a problem with you submitting your direct testimony,  
19 either side, I suppose. And you can get an affidavit or a  
20 declaration.

21 MR. HUNT: I think that's something that will be  
22 happening and I think all our exhibits -- excuse me, our  
23 exhibits will probably be admitted, be pre-admitted by  
24 agreement.

25 THE COURT: Is there a dispute regarding the

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1       deposits and withdrawals?

2            MR. HUNT: We don't believe there is.

3            THE COURT: Who represents the defense? Is there  
4 a dispute? I mean, you've looked at what the trustee --

5            MR. FOLKENFLIK: There are no disputes on deposits  
6 and withdrawals.

7            THE COURT: So are there any disputed issues of  
8 fact.

9            MR. FOLKENFLIK: Let me try and --

10          THE COURT: Would you just identify yourself?

11          MR. FOLKENFLIK: Yes, Your Honor. Good morning.

12          I'm Max Folkenflik, Folkenflik & McGerity, counsel for the  
13 Auerbach trust and Robert Auerbach, currently deceased, the  
14 state of Robert Auerbach and Joyce Auerbach. We had a meet  
15 and confer session. There were a number of issues.  
16 Obviously my client has a relatively small amount at issue,  
17 \$570,000.

18          So we have tried -- I think I discussed this case  
19 with Your Honor a couple years ago. We've tried to --

20          THE COURT: Not with me a couple years ago, but  
21 okay.

22          MR. FOLKENFLIK: I believe there was a conference  
23 --

24          THE COURT: Well, maybe yes.

25          MR. FOLKENFLIK: Where Your Honor said we've got

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1 to get these cases moving toward trial and here we are two  
2 years later.

3 THE COURT: I suppose that's progress, Mr.  
4 Folkenflik.

5 MR. FOLKENFLIK: I'm not sure, but somewhat. But  
6 there are a couple issues that I did want to raise, first as  
7 to disputed issues of fact. I think there is no disputed  
8 issue of fact that but for the interpretation of the  
9 interaction between SIPA and the bankruptcy code that Your  
10 Honor has adopted and Judge (indiscernible) had adopted, my  
11 client would have a claim against BLMIS and the Bernard  
12 Madoff estate that exceeds the amount of the claw back  
13 that's being sought.

14 And the reason I -- and I asked counsel for the  
15 trustee to stipulate to that because as a matter of law my  
16 clients opened their account with \$2 million in --

17 THE COURT: Why didn't you just file the claim  
18 against the general estate?

19 MR. FOLKENFLIK: Pardon me?

20 THE COURT: Have you filed a claim against the  
21 general estate?

22 MR. FOLKENFLIK: We filed -- I don't recall  
23 whether we filed a claim against the general estate at this  
24 point. We may have. But the point is that if there is such  
25 a claim against the general estate exceeding the amount of

1 the claw back and the 2nd Circuit disagrees with Your  
2 Honor's interpretation on the antecedent debt issue and  
3 Judge (indiscernible)'s interpretation, then my client would  
4 have the --

5 THE COURT: In other words, just a 2nd Circuit  
6 summary order which indicated -- which seemed to adopt the  
7 view that you don't -- there's no value given for fictitious  
8 profits.

9 MR. FOLKENFLIK: That's not -- well, that's not  
10 precisely the way I'd frame the issue. I would --

11 THE COURT: Well, there are two issues. There's  
12 the SIPA issue with the estate within the estate. But then  
13 there's the more general issue that if you get fictitious  
14 profits you can't get consideration for fictitious profits,  
15 the value.

16 MR. FOLKENFLIK: Well, Your Honor, it's not a  
17 question of fictitious profits.

18 THE COURT: But that sounds like a legal issue.

19 MR. FOLKENFLIK: It's a legal issue.

20 THE COURT: Right.

21 MR. FOLKENFLIK: But I want to preserve the legal  
22 issue by addressing the factual issue of my client's claim  
23 against the Madoff estate and I'm --

24 THE COURT: But weren't you part of the withdrawn  
25 proceedings?

1 MR. FOLKENFLIK: I was.

2 THE COURT: So you preserve the issue.

3 MR. FOLKENFLIK: Well, not at -- so we have to  
4 address it at trial.

5 THE COURT: I'm not going to reconsider the  
6 thought for the --

7 MR. FOLKENFLIK: I'm not asking Your Honor for  
8 that.

9 THE COURT: So what is the factual issue?

10 MR. FOLKENFLIK: The factual issue I'm asking we  
11 would have to demonstrate with facts or risk having  
12 collateral to stop --

13 THE COURT: Well, if you have that last monthly  
14 statement, it's going to show a balance, I assume, right?

15 MR. FOLKENFLIK: Yes, it is.

16 THE COURT: And your argument is that under  
17 Article 8 UCC you have a claim for that amount, right?

18 MR. FOLKENFLIK: That's one of the claims. An  
19 alternate claim is a claim for fraud in 1999 and with  
20 interest starting at 9% per year as a matter of statutory  
21 right. So we have --

22 THE COURT: It's only on a judgment though.

23 MR. FOLKENFLIK: Pardon me?

24 THE COURT: It's only on a judgment, right?

25 MR. FOLKENFLIK: It's pre-judgment interest,

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1 that's right, from the date of the trial.

2 THE COURT: Are you looking for a judgment?

3 MR. FOLKENFLIK: Pardon me?

4 THE COURT: Are you looking for a judgment?

5 MR. FOLKENFLIK: I'm looking to be able to avoid  
6 the claw back by asserting -- and the 2nd Circuit agrees --  
7 by asserting that the amount that's being sought is less  
8 than the amount of my client's claim against Madoff.

9 THE COURT: You mean you're going to try to --

10 MR. FOLKENFLIK: Pardon me?

11 THE COURT: You want to try a fraud claim against  
12 Madoff within the context of the suit?

13 MR. FOLKENFLIK: Not at all. I just want to  
14 stipulate to the facts that I think the fraud claim's  
15 established by the trustee's arguments and by the trustee's  
16 proof and by the trustee's complaint. I think that the  
17 issue is how much, what's my client's claim using the word  
18 claim as it's used in the Bankruptcy Act.

19 And I think an antecedent debt is based on the  
20 merit of the claim. Your Honor's decision, Judge Rakoff's  
21 decision to cut to the chase, says there's a conflict  
22 between these two federal statutes. In order to read them  
23 together in a way that's most sensible, you have to say that  
24 the antecedent debt in the Ponzi scheme case cannot be the  
25 amount of the claim for fraud or otherwise. It's not a

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1 matter of just the statement value, which it could be. As  
2 counsel for the trustee pointed out, they send a statement,  
3 ten days later it's bonding on both parties as a matter of  
4 law.

5 And when I watched argument on the net equity case  
6 in the 2nd Circuit, then Chief Judge Jacobs clearly said I  
7 think all of the customers had claims against  
8 (indiscernible) for the full amount of the statement value  
9 and Judge (indiscernible) nodded her head, yes.

10 So I think --

11 THE COURT: You may be right but I'm not so sure  
12 that the statement courts have interpreted it that way in  
13 insurance cases?

14 MR. FOLKENFLIK: Pardon me? But right now we're  
15 talking as a matter of federal law.

16 THE COURT: So what is --

17 MR. FOLKENFLIK: I just want to establish the  
18 amount of the claim and not the legal consequence of the  
19 existence of the amount of the claim but that the amount of  
20 the claim exceeds the \$570,000 --

21 THE COURT: So essentially you want to try to  
22 settle it.

23 MR. FOLKENFLIK: Pardon me?

24 THE COURT: You want to try to settle the claim.

25 MR. FOLKENFLIK: That's one way of looking at it.

1 I wouldn't quite describe it that way.

2 THE COURT: But isn't the response that that is  
3 irrelevant to the purposes of this trial?

4 MR. FOLKENFLIK: If the 2nd Circuit disagrees with  
5 Your Honor, no. And if the 2nd Circuit agrees with Your  
6 Honor, yes. I just want to be able to tee up the issue for  
7 the 2nd Circuit.

8 THE COURT: I understand. Let me just hear a  
9 response to that.

10 MR. FOLKENFLIK: Okay, because I have a few more  
11 issues to raise.

12 MR. HUNT: I agree with what you said, Your Honor.  
13 That's not really relevant to this case.

14 THE COURT: But it does create a record. In other  
15 words, at the end of the day he'll make an offer of proof  
16 and we'll either litigate it or not litigate it because --

17 MR. HUNT: Yeah, whatever facts he wants to raise  
18 at trial, if they're admissible in trial --

19 THE COURT: It sounds like we're going to be  
20 litigating a fraud case, also.

21 MR. FOLKENFLIK: Well, Your Honor, I think we  
22 could stipulate to it because I don't think it's disputable.  
23 But I don't know. That sounds like it is. The amounts are  
24 disputable. The legal consequences aren't. There should be  
25 no trial under those circumstances because there isn't a

1 factual dispute.

2 THE COURT: It sounds like there's a factual  
3 dispute though as to the amount of your damages, even if  
4 you're right on the fraud and I agree, you know, they say  
5 your client was defrauded by BLMIS and Madoff but there's a  
6 dispute other than I guess it's UCC Article 8 issues as to  
7 the amount.

8 MR. FOLKENFLIK: There's also no dispute also the  
9 entitlement to prejudgment interest at 9% from 1999.

10 THE COURT: I know.

11 MR. FOLKENFLIK: Pardon me?

12 THE COURT: I know because I'm not going to enter  
13 a judgment on your claim?

14 MR. FOLKENFLIK: Pardon me?

15 THE COURT: I'm not going to enter a judgment on  
16 your claim.

17 MR. FOLKENFLIK: It's not post judgment interest,  
18 Your Honor. It's prejudgment interest. So if I litigated  
19 in the --

20 THE COURT: But in order to get prejudgment  
21 interest you have to get a judgment, don't you? Isn't there  
22 a recent (indiscernible) case on that by Judge --

23 MR. HUNT: That's going to depend on whether --

24 THE COURT: Yeah, I'm not so sure you're entitled  
25 to prejudgment interest. Go ahead.

1                   MR. HUNT: Okay. The bottom line is I'd like to  
2 tee up the issue and have a factual record and I don't think  
3 there should be as much resistance as there is. But we are  
4 where we are. There's a second question that during our  
5 meet and confer session a week ago I asked why are we trying  
6 this case at all in this court.

7                   THE COURT: Because he says you owe them money, at  
8 the risk of being --

9                   MR. FOLKENFLIK: But as I said, but in this court,  
10 because respectfully as I understand the (indiscernible)  
11 rulings by Your Honor, you're going to report and recommend  
12 to the district court and I am not aware of an Article 1  
13 judge having a trial without consent and then reporting and  
14 recommending on the factual findings at the trial. I think  
15 if there is to be a trial it should be held in district  
16 court.

17                  THE COURT: Really? You're not familiar with  
18 procedure in this court, then.

19                  MR. FOLKENFLIK: I may be deficient.

20                  THE COURT: And maybe you impliedly consented to  
21 my trying the case during the final judgment. That's  
22 another issue I guess.

23                  MR. FOLKENFLIK: I don't believe I impliedly  
24 consent. We went through the --

25                  THE COURT: If you think somebody else should try

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1 this case, don't make that argument to me. Make a motion to  
2 redraw the reference. What else?

3 MR. FOLKENFLIK: Okay. And then there is an issue  
4 of subsequent transferees. The case has been started and  
5 proceeded right to this -- asserting my clients are  
6 subsequent transferees, which they are. There was a  
7 trusting between them and Mr. Madoff.

8 During our meet and confer session, Mr. Hunt said  
9 he was going to make a trial motion to amend to assert that  
10 my clients are initial transferees. And when I raised that  
11 this morning he said he's not doing it at this time. I'd  
12 like to clarify that issue.

13 THE COURT: That's the benefit of the pretrial  
14 order. We know exactly what everybody is claiming. I'm not  
15 sure that if you concede that you're a subsequent transferee  
16 what the difference is unless you think you can assert a  
17 defense as a subsequent transferee but you can't assert an  
18 initial transferee and I don't know if this is a  
19 (indiscernible) since the initial transferee and subsequent  
20 transferee are obviously related.

21 MR. FOLKENFLIK: Yes. The initial transferee was  
22 a revocable trust. I understand the issues that are raised  
23 by that. But there's a matter of burden of proof and burden  
24 of persuasion and order of proof in terms of the defenses  
25 which are the same but the defenses -- there's more burden

1 on the trustee.

2 THE COURT: All right. Well, you can deal with  
3 that in pretrial order because at that point you'll have to  
4 know if the trustee intends to assert.

5 MR. FOLKENFLIK: Okay. And the other thing is,  
6 Your Honor, I had just advised my client I would try and  
7 persuade Your Honor to defer our case to later in the queue  
8 so that this issue on which her case turns might be tried  
9 before the 2nd Circuit without her having to go to the  
10 expense of proceeding with a trial.

11 THE COURT: Couldn't everybody make the same  
12 argument?

13 MR. FOLKENFLIK: I think everybody could. I think  
14 it's more compelling argument when you've got a small  
15 amount. We have Mr. Levy here who is making the exact  
16 opposite argument. He's saying please let me into this case  
17 because we want to have the case tried.

18 THE COURT: Yeah. He's made that argument before.

19 MR. FOLKENFLIK: He has made that argument before.  
20 So, Your Honor, the issue is, yes, everybody could say let  
21 me go last and when there are 500 cases and they're being  
22 tried currently at the rate of one per year, going last  
23 seems to be quite a victor. But that's not the issue here.

24 The issue is why is the trustee selecting the  
25 small dollar cases and picking them off first? And I think

1 what happens --

2 THE COURT: Why do you think he's doing it?

3 MR. FOLKENFLIK: I think he's doing it to put an  
4 appropriate pressure on the defendants in the small dollar  
5 cases to settle rather than to extend the amount of legal  
6 fees involved. And by doing so he's causing them to forfeit  
7 the right to have a dispositive issue heard by the 2nd  
8 Circuit.

9 THE COURT: You know, you're telling me aside from  
10 the amount that your clients damages, that there are no  
11 disputed issues of fact. All you have to do is enter into a  
12 comprehensive pretrial order and then it's a legal argument.

13 MR. FOLKENFLIK: And that's right.

14 THE COURT: Most of the legal issues have been  
15 resolved. So then you ask me to certify the question to the  
16 2nd Circuit and you go up to the 2nd Circuit.

17 MR. FOLKENFLIK: If Your Honor would consider that  
18 procedure, we would --

19 THE COURT: It's provided for in the statute.

20 MR. FOLKENFLIK: I'm just trying to get to the  
21 point where my client doesn't give up rights and doesn't end  
22 up spending so much money in legal fees in the process of  
23 preserving rights that the game isn't worth the  
24 (indiscernible).

25 THE COURT: I got it. All right.

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1 MR. HUNT: Just to recap, I think we're ready for  
2 trial.

3 THE COURT: Well, I need the pretrial order as has  
4 been made abundantly clear by this lengthy extended draft of  
5 the pretrial order by Mr. Folkenflik.

6 MR. HUNT: Two, three weeks, something like that?  
7 We would like to try to set a date for trial, too.

8 THE COURT: Let's work -- let's do it this way.  
9 When are you going to send a pretrial order?

10 MR. HUNT: Three weeks from today.

11 THE COURT: So what day is that? Why don't we  
12 make it April, okay? I'm sorry, February, I missed a month.  
13 It's about the middle of March. It's more than three weeks.  
14 Let's say Friday, March 18th. Okay? You'll send them. How  
15 much time, Mr. Folkenflik, do you need to turn it around?

16 MR. FOLKENFLIK: I think three weeks as well, Your  
17 Honor.

18 THE COURT: All right. So what does that take us  
19 to? That's the 39th of March, which is April 8th? April  
20 8th. Schedule another conference and I'll fix the trial  
21 date at the next conference. April 14th. Plaintiff can use  
22 numbers for the exhibits. Defendant can use letters. Yes,  
23 Mr. Levy.

24 MR. LEVY: Good morning, Your Honor. Richard Levy  
25 at Pryor Cashman for various customers. This does raise the

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1 question. Yes, we did ask you previously to be admitted in  
2 the (indiscernible - Cullen) case to intervene.

3 THE COURT: It's sub judice.

4 MR. LEVY: Pardon me?

5 THE COURT: It's sub judice.

6 MR. LEVY: It's sub judice? We have the exact  
7 same issues in almost the exact posture of this case  
8 although we are here earlier than we were in (indiscernible  
9 - Cullen).

10 THE COURT: Well, the issues, I don't know what  
11 the issues are until I see the pretrial order. As I said  
12 with respect to (indiscernible - Cullen), I'm not going to  
13 hear you on issues that the party doesn't intend to raise.

14 MR. LEVY: Understood, Your Honor.

15 THE COURT: I may not hear you readily but I'm  
16 certainly not going to hear you on issues that the parties  
17 aren't raising. So I don't know what the issues are.

18 MR. LEVY: Then may I suggest, Your Honor, we'll  
19 remain vigilant as to what's happening in the procedure. We  
20 may well be back here to ask you for permission to appear.

21 THE COURT: I'm sure you will be.

22 MR. LEVY: Thank you, Your Honor.

23 THE COURT: All right. Thank you.

24 MR. FOLKENFLIK: Thank you, Your Honor.

25 THE COURT: Thanks. See you April 14th. The

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1 discovery conference in Bernfeld. Yes.

2 WOMAN: Good morning, Your Honor. Counsel did  
3 appear. The clerk had asked me if counsel is here and at  
4 the time he wasn't but he is here now.

5 THE COURT: Did you give your appearance to the  
6 reporter?

7 MR. WEDEEN: Not yet, Judge.

8 THE COURT: Why don't you do that?

9 MR. WEDEEN: Good morning, Timothy Wedeen, W-E-D-  
10 E-E-N. Judge, I'm here on three cases, all the same issue.

11 THE COURT: Okay.

12 MR. WEDEEN: Just for the record it's  
13 (indiscernible) number 4841, 4918 and 8514.

14 THE COURT: Go ahead.

15 MS. HOCHMOTH: Good morning, Your Honor. My name  
16 is Farrell Hochmoth here on behalf of the trustee. As  
17 counsel said, I'm here on three cases (indiscernible), Alan  
18 Bernfeld and Marilyn Bernfeld. I am here today to ask the  
19 court's permission to file a motion for sanctions pursuant  
20 to Federal Rule of Civil Procedure 37b2A and C.

21 The trustee served discovery in each of these  
22 three cases last July. When defendants did not respond to  
23 that discovery, the court held a conference at the end of  
24 October where he ordered the defendants to respond to the  
25 discovery. Orders were submitted to the court and signed

1 requiring the defendants to respond to the discovery by  
2 December 1st. December 2nd, we did not receive the  
3 discovery. I followed up with counsel and then eventually  
4 filed another letter on December 11th.

5 THE COURT: Go ahead.

6 MS. HOCHMOTH: Thank you, Your Honor. On December  
7 11th requesting a conference so that the trustee could seek  
8 permission to file a motion for sanctions. That letter was  
9 originally set for a conference t the end of January.  
10 Before the hearing, counsel contacted me telling me that he  
11 had health issues necessitating an adjournment of the  
12 conference, which we did agree to, to today.

13 I never gave counsel any indication that I would  
14 permit any additional time to respond to discovery. In  
15 fact, Your Honor has required him to respond to all the  
16 discovery by December 1st. We have received no responses in  
17 this case to date.

18 I would like to point out the discovery responses  
19 are now six months overdue. There is no excuse for why  
20 counsel has not provided responses. Counsel admits that the  
21 illness that he was diagnosed with didn't occur until  
22 January which provides no excuse for not responding from  
23 August through now. Also, counsel said he's working on a  
24 reduce schedule, but in my mind, that would still permit  
25 counsel and defendants to respond to your orders from

1 December 1st.

2 THE COURT: Okay.

3 MR. WEDEEN: Your Honor, I agree that we are in  
4 fault. I would like to correct Ms. Hochmoth, actually, that  
5 I had some health issues which I have recovered from that  
6 were not insignificant.

7 My clients have provided me responses. I was  
8 wondering if Your Honor could enter almost a conditional  
9 order. Just we could have another three weeks more,  
10 thinking somewhere around there, Judge, I will be able to  
11 file responses in (indiscernible) and it should be self-  
12 enforcing. I may not --

13 THE COURT: And self-enforcing means what? To  
14 consent to the entry of judgment if you don't provide full  
15 responses?

16 MR. WEDEEN: Yes. The delay, Judge --

17 THE COURT: Sounds like it could be a shortcut.

18 MR. WEDEEN: Well, Judge, at this juncture, Your  
19 Honor, the delay really is on me. I mean, I don't belabor  
20 my medical conditions to the court but --

21 MS. HOCHMOTH: Okay. Your Honor, we would request  
22 that if you did consider that that you -- we would also then  
23 seek permission to file a motion to seek our attorneys fees  
24 in having to come down here.

25 THE COURT: You know what? Why don't you make

1 your motion? This has gone on long enough. You may be  
2 entitled to attorneys fees. You may be entitled to other  
3 sanctions, including the striking of the entry of judgment.  
4 But there is a conclusion. Why don't you make the motion?  
5 This has gone on a long time and I think this is the third  
6 conference I've had on this case about this matter.

7 MS. HOCHMOTH: Thank you.

8 MR. WEDEEN: Second, Judge.

9 THE COURT: Second. You go ahead and make your  
10 motion.

11 MR. WEDEEN: And we'll return on the 18th for the  
12 motions, Your Honor?

13 THE COURT: Why don't you see if you can work it  
14 out on a reasonably short schedule, otherwise just make the  
15 motion and get a return date for --

16 MS. HOCHMOTH: Yes, Your Honor. Thank you very  
17 much.

18 THE COURT: Okay. Take a five minute break before  
19 we do Mendelow. That's the last one I have.

20 (break)

21 THE COURT: Mendelow.

22 MR. NEW: Good morning, Your Honor. Jonathan New  
23 for the trustee. The trustee is seeking leave to amend the  
24 complaint in this adversary proceeding for the first time  
25 and in the very early stages of discovery. As the proposed

1 amendment will not be futile, will not prejudice the  
2 defendants and there has been no undue delay, the court  
3 should grant leave to amend under the liberal pleading  
4 standards of Rule 15.

5 The Safe Harbor does not protect individuals like  
6 Mr. Mendelow who did not have a legitimate expectation that  
7 BLMIS was actually trading securities in his accounts on his  
8 behalf.

9 As the proposed amended complaint alleges, Mr.  
10 Mendelow opened his accounts only after first receiving a  
11 promise from Mr. Madoff that he would receive special  
12 financial benefits which took the form of a guaranteed  
13 return of at least 17% on certain accounts, not a consistent  
14 returned but a guaranteed return, and that he would also get  
15 extra value added to the accounts every year in a  
16 predetermined amount. And that was effectuated through the  
17 entry of fictitious transactions on his account statements.

18 THE COURT: Well, what's wrong with an agreement  
19 where he's going to be compensated for referring customers  
20 and Madoff says, look, you know, I guarantee 17%? If your  
21 accounts don't earn that, I'll make up the difference?

22 MR. NEW: Well, Your Honor, first of all, I don't  
23 think it was -- I think there are two separate issues there.  
24 There's the issue of whether a guaranteed return in and of  
25 itself presents somebody with actual knowledge that the

1 account is not trading --

2 THE COURT: It seems to be relying heavily on that  
3 is to support an inference of actual knowledge.

4 MR. NEW: I think that's one of our arguments,  
5 Your Honor. I think we have several. With regard to the  
6 guaranteed return, again, it's not that Mr. Madoff would  
7 make it up to him. There's no evidence that when he didn't  
8 get 17% return Mr. Madoff added extra securities to his  
9 account or extra cash to his account. It was a guaranteed  
10 return that Mr. Mendelow referred to --

11 THE COURT: Well, doesn't that happen every  
12 December, though?

13 MR. NEW: The guaranteed return, Your Honor, was  
14 sort of an annual return that as Mr. (indiscernible)  
15 testified and as we allege in our complaint, come December  
16 BLMIS would be able to determine whether or not through the  
17 fictitious trades they entered up to, then, they actually  
18 achieved the 17% return and if they hadn't in December they  
19 would then raise the 17%.

20 On top of that, there was the extra P&L which was  
21 in a fixed amount which was then entered in December through  
22 these fictitious (indiscernible) transactions into the  
23 accounts as directed by Mr. Mendelow in the amounts directed  
24 by Mr. Mendelow.

25 THE COURT: That was for the customers that he

1 referred.

2 MR. NEW: Well, Your Honor, I don't --

3 THE COURT: Is that supposedly how it was computed  
4 or what it was based on?

5 MR. NEW: Well, the basis for the calculation,  
6 Your Honor, is based on Telfran customers that were returned  
7 to BLMIS directly after Telfran was shut down. But we would  
8 take issue with characterizing it as a referral fee, Your  
9 Honor, because Mr. Mendelow as alleged in the complaint did  
10 introduce other customers to Mr. Madoff over the years.  
11 There was no referral fee connection with those customers.

12 As the accounts decreased over time and customers  
13 withdrew their cash, there was no adjustment to the referral  
14 fee. This was not a referral fee, Your Honor. This was, as  
15 we allege in the complain, this was an effort to make up for  
16 the profits that Mr. Mendelow previously received through  
17 the Telfran arrangement with and he was now being guaranteed  
18 a set amount of money every year in perpetuity in his  
19 accounts and that was not being accomplished through cash  
20 contributions into his accounts, through a check sent to  
21 him, through securities deposited to his accounts. It was  
22 being accomplished through fictitious transactions.

23 THE COURT: Okay. So what are the allegations in  
24 the complaint, the proposed complaint that say that he knew  
25 that he was being raised to 17% or plus his fee

1 (indiscernible) fictitious transactions? As opposed to  
2 that's what BLMIS did.

3 MR. NEW: Yes, Your Honor. I think it's in a  
4 number of locations and I think, obviously, Your Honor, we  
5 allege that he knew that in several locations. But there  
6 are facts --

7 THE COURT: But that's conclusory.

8 MR. NEW: Yes, Your Honor. And that's why I'm  
9 going to, Your Honor, if I may, explain certain facts that  
10 show how he knew and why he knew.

11 First, as we allege, he contacted Mr.  
12 (indiscernible - D) every December and he said to Mr.  
13 (indiscernible - D) something to the effect of on that thing  
14 that you do, I want, you know, for example -- the example we  
15 give in the complaint is, you know, \$115 million in my  
16 accounts and \$115 million in my wife's account. So he knows  
17 Mr. (indiscernible - D) is engaging in a process in December  
18 that yields a predetermined amount and he tells him what he  
19 wants and where he wants it.

20 In addition to that, it's clear from his own  
21 handwritten calculations, the calculations that he provided  
22 to help Mr. (indiscernible - D) work out the mechanics of  
23 the extra P&L that these extra bonuses to the value of his  
24 account were not cash contributions because he didn't denote  
25 them as contributions. They weren't securities

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1 contributions. They were something else. They were what he  
2 called the vig or a fee.

3 And the only way that they can be accomplished in  
4 his account, the only way to raise the balances of his  
5 account, if it wasn't cash, if it wasn't through securities,  
6 is through the purported return on securities already in the  
7 account.

8 THE COURT: But how did he know that the return  
9 wasn't based on an actual securities transaction? In other  
10 words, where do you allege that in the complaint of facts?

11 MR. NEW: Your Honor, in terms of like the  
12 securities transactions were fictitious as opposed to real?

13 THE COURT: Well, he knew the additional amount,  
14 whatever you call it, was being generated by fictitious  
15 trades. BLMIS we assume knew it but where are the facts  
16 that say that he knew it?

17 MR. NEW: Well, Your Honor, the facts that he knew  
18 it are, again, that he directed the specific amount and the  
19 accounts into which it could be made. That is not something  
20 that is possible through a real securities transaction. You  
21 can't say I want securities transactions in my account that  
22 yield \$115 million and then get that \$115 million on every  
23 year after year.

24 THE COURT: He never said -- as I understand it,  
25 you're not alleging that he told (indiscernible - D) or

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1 someone engage in these fictitious transactions and this is  
2 how I want you to allocate it. He's simply saying I'm  
3 entitled to, you know, \$200,000. I want \$100,000 in my  
4 account and I want \$100,000 in my wife's account.

5 MR. NEW: What we specifically allege, Your Honor,  
6 is that he said to Mr. (indiscernible - D) something to the  
7 effect of on that thing you do I want X amount for me and X  
8 amount for my wife. So he told him the amount. He told him  
9 how to allocate it and he referred to that thing that you  
10 do.

11 The other thing that I would point out, Your  
12 Honor, is that when he was directing Mr. (indiscernible - D)  
13 which accounts to put it into for most of the period of time  
14 covered by the complaint, it was his IRA. And as we've  
15 alleged in the complaint, it is not possible to make a  
16 securities contribution to an IRA account. The cash  
17 contributions would have exceeded the limits.

18 In order for him to have achieved that, it must  
19 have been done through transactions that delivered the exact  
20 amount on demand during the time period that he asked for  
21 it. He also received all of the account statements. We  
22 have allegations that there were handwritten notations  
23 showing that he reviewed the account statements and on the  
24 account statements for December for those IRA accounts,  
25 there were only, for many of those years, only transactions

1 showing these option transactions. Those are the only  
2 security transactions had occurred in the accounts in  
3 December that could yield the exact amount that he asked  
4 for.

5 I would also point out, Your Honor, that we have  
6 one example in the complaint where the transaction that he  
7 asked for was backdated. There is a specific example where  
8 he calls Mr. (indiscernible - D). We only know the phone  
9 records, Your Honor. We don't know what he said but we do  
10 know that generally he said to the effect of on that thing  
11 you do give me X amount. He calls Mr. (indiscernible - D)  
12 directly. He follows it up with a letter, with a number as  
13 to what he wants in the accounts that wants it in and on the  
14 December account statement there is a transaction that  
15 occurs before he first calls Mr. (indiscernible - D).

16 So just as in -- Your Honor, I think every case  
17 stands on its own but I think that that is comparable to  
18 some of the allegations that were against Robert Jaffe in  
19 the Cohmad case where the allegation that -- one of the  
20 allegations that Judge Rakoff focused on was an instance in  
21 which he sent a letter in to Madoff to BLMIS, said I want a  
22 loss of X amount. The allegation in the complaint then said  
23 Madoff executed that; BLMIS executed that through a  
24 backdated trade that yielded approximately the amount that  
25 Mr. Jaffe asked for.

1           And that was one of the facts that Judge Rakoff  
2        found was sufficient to establish that Mr. Jaffe, at least  
3        at the pleading stage, had actual knowledge because, again,  
4        Your Honor, the standard here -- and I know Your Honor is  
5        very familiar with the standard -- but at this stage, the  
6        standard is that he had actual -- that the defendants have  
7        actual knowledge that there were no securities transactions  
8        going on at least in their accounts or at least some of the  
9        transactions were not actual securities transactions.

10           Now, as we go forward or we move into discovery,  
11        obviously there will be disputes and we can take discovery  
12        on the broader issue but at least at the pleading stage we  
13        have satisfied that standard here both in terms of the  
14        guaranteed return, the manner in which the extra P&L was  
15        paid, the fact that Mr. Mendelow knew about that, the fact  
16        that he directed BLMIS on a yearly basis how much to pay him  
17        and where to pay it, the fact that it was always  
18        accomplished through backdated -- not backdated, Your  
19        Honor. Sometimes they backdated but always accomplished  
20        these fictitious (indiscernible) transactions.

21           And on top of that, Your Honor, he's coordinating  
22        with Mr. (indiscernible - D). From a macro level, Your  
23        Honor, we'd also point out the fact that if you look at the  
24        way that he treated these accounts, the way that he  
25        characterized his returns, he did not treat it as if it was

1 a securities trading account. He referred to his return in  
2 terms like interest and --

3 THE COURT: I read all that. So what? What does  
4 that mean?

5 MR. NEW: Well, Your Honor, it goes back to the  
6 very basics for the Safe Harbor. The Safe Harbor is to  
7 protect investors who have a legitimate expectation that  
8 there's securities trading going on in their accounts.

9 If somebody signs a securities contract with BLMIS  
10 as Mr. Mendelow did here, but at the very time that he signs  
11 it he knows, you know what, it doesn't matter what he trades  
12 in my accounts because he's giving me a fixed return as if  
13 it's a loan. He's giving me an extra amount. The  
14 securities transactions are irrelevant.

15 Well, we would argue, Your Honor, that that shows  
16 that he does not have a legitimate expectation like an  
17 innocent investor would that BLMIS was actually trading  
18 securities in those accounts. But he believes that Madoff  
19 is just giving him money year after year in a preset amount.

20 He's giving him value that he then has the  
21 opportunity and ability to withdraw and turn into cash,  
22 which is exactly what he did here. He and his family  
23 withdrew over \$11 million more than they ever put into their  
24 accounts and this spanned the course of 15 years.

25 In fact, if you look at the IRA accounts, there's

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1 some statistics we have in the complaint, Your Honor, where  
2 after the initial transfer into BLMIS -- those accounts were  
3 originally with A&B and he transferred them over to BLMIS --  
4 they put in almost no money and they lived off the  
5 fictitious profits.

6 Again, that's something that is consistent with  
7 somebody who doesn't believe there's actually trading going  
8 on, that Madoff is just giving him value in his accounts,  
9 which he can then withdraw and use for his own purposes.

10 It would emphasize again, Your Honor, that at this  
11 stage it is the pleading stage. We would be entitled to all  
12 plausible inferences in our favor, that we believe that  
13 there's more than enough in this complaint based on the  
14 facts that we have added to the complaint, in addition to  
15 the facts that were originally in the original complaint to  
16 raise the inference that Mr. Mendelow had actually knowledge  
17 that there was no securities transactions going on in his  
18 accounts.

19 THE COURT: At his deposition to remove 2004 exam,  
20 I understand he took the 5th. But what's the most direct  
21 question he was asked regarding his knowledge that there  
22 were no securities being traded in his account or that the  
23 December true-ups for lack of a better phrase did not result  
24 from actual trading?

25 MR. NEW: Your Honor, as we allege, he took the

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1 5th over 300 times.

2 THE COURT: Yeah, but --

3 MR. NEW: I know you don't have the specific --

4 THE COURT: I'm curious whether -- you're asking  
5 me to draw an inference and that's why I'm asking you  
6 whether he was ever asked a question did you know,  
7 basically, that there were no securities being traded in  
8 your account or some such (indiscernible)?

9 MR. NEW: Well, we did ask, Your Honor, that for  
10 example -- and this is on Page 81 of the transcript --  
11 wouldn't you agree that it's impossible to have a guaranteed  
12 consistent rate of return on investments in the stock  
13 market? He took the 5th on that. Isn't it true -- and this  
14 is on Page 82 to 83 of the transcript -- and, Your Honor, we  
15 could always provide a copy of the transcript to the court.  
16 It is referenced in the complaint and so it is incorporated  
17 by reference. We did not want to burden the court with a  
18 lengthy transcript but we're happy to submit it if it would  
19 help the court.

20 On Pages 82 to 83, the question was asked, "Mr.  
21 Mendelow, isn't it true that you knew that fictitious option  
22 transactions were added to your BLMIS accounts in order to  
23 falsely meet the guaranteed rate of return that Mr. Madoff  
24 had promised you?" Answer, "I take the 5th," which is --  
25 and there are others along those lines. "Isn't it true," --

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1 this is on Page 85, "Isn't it true that fictitious option  
2 trades were added to your BLMIS accounts in order to provide  
3 you with the amount of the finder's fee?" "I take the 5th."

4 THE COURT: Okay.

5 MR. NEW: He was directly asked that, Your Honor.  
6 He was also directly asked about his relationship with Mr.  
7 Madoff whether he had personal contact with Mr. Madoff,  
8 whether he met him, spoke to him on the phone, whether he  
9 visited BLMIS' offices, whether he went to the 17th floor,  
10 all the things that the defendant now takes issue with us  
11 not specifying in the amended complaint he took the 5th on.

12 And Your Honor, apparently from the motion papers  
13 here, it sounds as if Mr. Mendelow will sit for a deposition  
14 if this case moves forward. So perhaps we'll be able to ask  
15 him those questions directly. There will be a full  
16 evidentiary record as to whether or not he had knowledge  
17 that these transactions were fictitious.

18 If there's a factual dispute, we can take it to  
19 trial and that's really what we're asking for at this stage,  
20 Your Honor, is the opportunity to continue on with this  
21 case, to proceed to discovery. And defendant's obviously  
22 have their theory of the case. They have their view of the  
23 facts.

24 At this stage, the trustee is entitled to have the  
25 allegations in the complaint treated as correct and true and

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1 afterwards we can move on to discovery and have our factual  
2 dispute.

3 THE COURT: Another question, part of your case  
4 against the daughters is based on imputation --

5 MR. NEW: Yes, Your Honor.

6 THE COURT: -- of his knowledge. What facts do you  
7 allege to support imputation? I see general allegations  
8 that he controlled the accounts but I didn't see any  
9 specific allegations regarding actual transactions of the  
10 accounts.

11 MR. NEW: Yes, Your Honor. With regard to Cara  
12 Mendelow, on Paragraph 19, the proposed amended complaint  
13 alleges that Mendelow opened Cara's account for her with a  
14 check that was drawn on the C&P Associate's bank account.  
15 And he signed that check. Now, it also alleges that he  
16 directed -- and this is in Paragraph 175 -- that he directed  
17 contributions and withdrawals into the account or from the  
18 account.

19 THE COURT: Didn't I reject similar allegations in  
20 Shapiro (indiscernible)?

21 MR. NEW: I don't believe you did, Your Honor.  
22 You know, I'd have to go back and check Shapiro, but I  
23 believe that at this stage it's sufficient to say that at a  
24 fact, he directed contributions and withdrawals and he  
25 communicated with BLMIS on her behalf.

1           It's not a conclusory allegation that he managed  
2       the accounts. It's actually saying that he directed  
3       withdrawals, he directed deposits.

4           THE COURT: Did he get the statements. He alleged  
5       that he got the statements to those accounts?

6           MR. NEW: Your Honor, I don't believe that we do  
7       allege he got the statements. I'm not sure that we know at  
8       this stage to be honest with you, Your Honor.

9           THE COURT: I mean, there's a lot of things you  
10      don't know but through discovery you still have to put in a  
11      complaint.

12          MR. NEW: We're doing the best we can, Your Honor,  
13      based on the facts as we knew them at the time.

14          THE COURT: Okay. Was Mendelow asked any of those  
15      questions at the Rule 2004 exam in (indiscernible)?

16          MR. NEW: In terms of his daughters, Your Honor?

17          THE COURT: Yes.

18          MR. NEW: Your Honor, I'd have to review the  
19      transcript. I'm not prepared at this time to have the  
20      answer of whether he was or he wasn't.

21          THE COURT: Thank you.

22          MR. NEW: Your Honor.

23          MR. ARKIN: Good morning, Your Honor.

24          THE COURT: Good morning.

25          MR. ARKIN: I'm Stanley Arkin and together with my

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1       collages Alex Reisen. We're here to address the court. I  
2       am willing to have Mr. Reisen argue the case mainly but I'd  
3       like to make a couple of very brief general observations  
4       with Your Honor's indulgence.

5           THE COURT: Sure.

6           MR. ARKIN: Which I'll refer to on the record.  
7       There is this argument which my friend, Mr. New and company,  
8       makes. Somehow my firm, we were responsible for some  
9       terrible scheme to delay the progress of this case for some  
10      several years and that's our fault somehow that so much time  
11      went by during which, of course, Mr. (indiscernible - d), a  
12      key witness, died.

13           And somehow that should be held against us in  
14      respect to this motion. We never talk about the fact. We  
15      don't hear a thing about the fact. And by the way, I'd say  
16      they look well-fed, well-worked.

17           THE COURT: So does everybody in this courtroom.

18           MR. ARKIN: Absolutely. Well, it's America in a  
19      bankruptcy court. But these people have one of the most  
20      extraordinary primary lucrative cases in America for several  
21      years and the reason so much time went by I might suggest is  
22      not because we were hiding or we were somehow camouflaging  
23      ourselves. We were right there always available for  
24      communication.

25           And the reason is that they were busy and they had

1 bigger fish to fry, bigger people to go after and we were  
2 just, if you will, one of the smaller cases, not who we are.  
3 And it should not be held against us in any way that we as a  
4 defendant didn't energize the progress of this case.

5 THE COURT: I don't understand them to be saying  
6 that. It's in response to your argument that there's been  
7 undue delay. They argue that there's been delay on your  
8 side, also, and that's part of the reason.

9 MR. ARKIN: I'd like to point to is they could  
10 (indiscernible) at any time and the reason they didn't is  
11 really because they have nothing else to do. That's my  
12 point.

13 The second thing I should say -- again, it's just  
14 an anecdotal observation -- is that, sure, the issue is  
15 actual knowledge, which both in this jurisdiction here, in  
16 the criminal law, in any of our major (indiscernible), it's  
17 a very difficult concept. Actual knowledge would mean Mr.  
18 Mendelow knew -- to use their language in their brief --  
19 that there was a house of cards, a complete fraud, Ponzi  
20 scheme.

21 Nobody remarks upon the notion or the fact that  
22 this very smart accountant, our client, Mr. Steven Mendelow,  
23 left a whole lot of money on the table. If he believed this  
24 was a house of cards which could blow up, turn into flames  
25 at no time at all as it was based on nothing but fraud, why

1 would he have left his money there?

2 I think there should be some inference there in  
3 our favor. In any event, Mr. Reisen, will (indiscernible).  
4 Thank you for your indulgence.

5 THE COURT: Mr. Reisen will rise. Thank you very  
6 much.

7 MR. ARKIN: Thank you.

8 MR. REISEN: Good morning, Your Honor.

9 THE COURT: Good morning.

10 MR. REISEN: Alex Reisen for defendants. I'd very  
11 much like to address the specific points Mr. New has raised  
12 but so why don't we just jump into that and then I'll sort  
13 of step back?

14 I guess I'm most concerned about the 5th amendment  
15 argument right now. I just -- none of those -- first of  
16 all, I believe he took a total blanket 5th amendment on all  
17 of this stuff.

18 THE COURT: Well my understanding is you have to  
19 be asked the question.

20 MR. REISEN: Understood, understood. But yes, to  
21 all of them. It wasn't like -- so also we know in Jaffe you  
22 may draw an inference. If so, it's weak. Anyone could be  
23 drawing --

24 THE COURT: But for the purposes of -- it really  
25 comes down to for the purposes of a motion to dismiss, if

1 he's asked the \$64,000 question did you know and he says I  
2 take the 5th, why can't I draw the inference at least for  
3 pleading purposes and maybe for trial purposes that he did?

4 MR. REISEN: Well, I think because you're allowed  
5 to take the 5th and I think he's worried about waiver among  
6 other things. If he says no to this, well, what else can  
7 you answer about it? So I mean, I really don't think  
8 there's any precedent.

9 The trustee doesn't -- first of all, none of those  
10 are in the proposed amended complaint. None of it is in  
11 their briefing. We're totally caught off guard.

12 THE COURT: Well, they do allege that he took the  
13 5th and I think I can look at that transcript.

14 MR. REISEN: Okay. Fair enough.

15 THE COURT: And they rely on it for that matter.

16 MR. REISEN: Fair enough. So let's also talk  
17 about Mr. New's first statement was legitimate expectations.  
18 It doesn't protect -- that's actually not the standard. We  
19 knew Merkin knew that there was a high degree of  
20 probability.

21 THE COURT: Let me stop you on that.

22 MR. REISEN: Sure.

23 THE COURT: There is a difference between  
24 receiving high returns ever year even when the market is  
25 going down and being told before you put your first dollar

1       in really don't worry you're going to make 17%. That's a  
2       distinction that you have to draw.

3                    MR. REISEN: Fair enough. Okay. So let's --  
4       their claim --

5                    THE COURT: I don't think Merkin has anything to  
6       do with this case. It's more of a Shapiro type case. It's  
7       not a typical red flag case. It's a case where the argument  
8       is he actually participated or conspired with BLMIS  
9       management to create these fictitious profits.

10                  MR. REISEN: We actually don't agree that there's  
11       any factual allegations of any such thing. I think it's  
12       only inquiry notice and it's all speculation.

13                  Let's go back to Twombly. Twombly says non -- you  
14       cannot draw non-speculative inferences, not just plausible.  
15       But this is all pure speculation based on inquiry notice.  
16       Even if Mendelow saw these specific trades, saw this, then  
17       took the next step and realized, oh, this is a red flag,  
18       even -- neither of those two things are alleged. Even then,  
19       there would be a dozen different things one would assume  
20       rather than no securities trades.

21                  THE COURT: So how do they allege actual knowledge  
22       if every fact they allege simply puts them on inquiry  
23       notice?

24                  MR. REISEN: Well, we can talk about some of the  
25       times that you do, but there's -- but it's among the

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1 specific facts you must plead a strong inference, specific  
2 facts that are with particularity that draw a plausible non-  
3 speculative inference.

4 And, so yes, obviously it would be great if you  
5 say I knew it but there -- also, all of this stuff is pure  
6 inquiry notice. We can go through the different facts that  
7 are alleged and I'll tell you why it's pure speculation and  
8 pure inquiry notice and does not draw that non-speculative  
9 inference.

10 Let's go straight to the guaranteed returns  
11 because that seems to be an issue. Their claim is that  
12 could never be done in a real securities market.

13 Now, first of all, of course, the assumption is,  
14 yes, like you said, like we talked about last time, you can  
15 just, as he's got a huge, you know, stable -- he's the  
16 biggest market maker of (indiscernible) allocates when he  
17 trades the same way he does with the extra P&L. But there's  
18 --

19 THE COURT: Slow down.

20 MR. REISEN: Sure, sure.

21 THE COURT: Go ahead.

22 MR. REISEN: So there's also another way that you  
23 can do it and a very simple example. You know, Mendelow  
24 bears the risk. He's got multibillion dollar bank rolls.  
25 He sells options for \$1000 that a one in a thousand event

1 occurs. He sells, you know, 432 of them. If the long shot  
2 comes in, Madoff pays it off. He just bears the risk.  
3 That's the exactly the way. There's an infinite numbers of  
4 ways you can "guarantee" returns.

5 So if you had said that -- or he could just -- you  
6 could just guarantee something. Everyone guarantees things  
7 and, you know, if -- maybe he'll have just -- it would be  
8 wrong and he'll just default.

9 But the bottom line is it's not a non-speculative  
10 inference if you're told you'll get a guaranteed return that  
11 all of a sudden you have actual knowledge. That is such a  
12 high bar of such a narrow fact you believe that there is no  
13 securities trading.

14 The SEC, everyone who had thought it back in '92,  
15 guaranteed returns, it's on the TV special, guaranteed  
16 returns.

17 THE COURT: Where is that in the complaint? I'm  
18 looking at the complaint. It sounds like you're going  
19 outside the complaint.

20 MR. REISEN: Sure. Well, let's talk about just is  
21 it a non-speculative -- and this was in the original  
22 complaint, by the way.

23 THE COURT: Well, for instance, and that's why I  
24 asked Mr. New what allegations were in the complaint. And  
25 the substance of what he says, what the complaint says is

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1 every December Mendelow computed what he needed to get to  
2 his number. He would contact (indiscernible - D). He would  
3 say this is what I need. This is what I'm entitled to.  
4 This is how I want you to divide it up and then magically  
5 that number would show up in the December statements as  
6 options transactions, profits from option transactions.

7 Why doesn't that tell them these are not  
8 legitimate trades? They're just constructed in order to  
9 give me what I'm --

10 MR. REISEN: It might be.

11 THE COURT: So why isn't that a reasonable  
12 inference?

13 MR. REISEN: It's not alleged that he ever looked  
14 at any of these statements. It's alleged that -- it doesn't  
15 even contemplate. First of all, it's only alleged that he  
16 did this twice.

17 Second of all, he just -- he knows his absolute  
18 balance. He doesn't even need to look at one single  
19 transaction. He knows his balance times 17% and he knows  
20 his --

21 THE COURT: This is a guy who looks at everything,  
22 at least the way that it's alleged. He's marking up  
23 documents. He's communicating. He's obviously looking  
24 beforehand at his statements in order to be sure in terms of  
25 what he's entitled to. So you don't think he's looking at

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1 it afterwards to see that he'd gotten what he's asked for.

2 MR. REISEN: Well, let's look at actually what's  
3 written there. There's only two calculations and the actual  
4 scan. There's two things. It says 17% times the absolute  
5 amount, all you have to look at is the balance. He never  
6 necessarily even saw any of -- whether it was option  
7 transactions.

8 THE COURT: Isn't it reasonable to infer that he  
9 looked at the statements given the meticulousness with which  
10 he examined them in order to be sure that he got what he was  
11 entitled to?

12 MR. REISEN: That is not a non-speculative  
13 inference to say that because he, Mendelow, who is alleged  
14 to be a diligent worker, that he looked at the balances,  
15 looked at everything, cross checked it against things and  
16 came to actual knowledge.

17 THE COURT: -- that he looked at these statements,  
18 would you say that's a conclusory allegation?

19 MR. REISEN: But all -- remember, they made with  
20 particularity, they cannot allege that he looked at any  
21 particular transactions. What they allege is that he looked  
22 at the statements. They're very careful. If they could  
23 allege that he looked at a particular transaction, if there  
24 was any evidence ever over 20 years that he ever looked at  
25 one, they would say it.

1           All he said is that he reviewed his overall  
2 transactions. The only thing he needed to do was look at  
3 the balances and that could easily -- and clearly the  
4 inference is that he allocates the amount of that Bernie  
5 Madoff bears the risk.

6           Now, remember, it's not is it plausible to say  
7 Mendelow maybe had some suspicion but never -- this is  
8 really a continuum. We've got the actual receipt of the red  
9 flag (indiscernible) something that's -- then there's actual  
10 looking at it. Then there's actual that there's some  
11 suspicion. Then there's Merkin. There's high risk. But  
12 then there's high degree of certainty that no securities  
13 traded.

14           To come to that conclusion, I mean -- I just want  
15 to step back for a second. I feel like we lose the forest  
16 for the trees. My wife is ex-securities attorney. She now  
17 works for a nonprofit. She said --

18           THE COURT: I think you're going outside the  
19 record.

20           MR. REISEN: Understood. Fair enough. That is  
21 definitely not put in the complaint. But the idea is -- and  
22 she said, well, you know, what is the standard? I said  
23 actual knowledge that no securities were traded. She said,  
24 well, how can you do it? Everyone's jaw dropped. That's  
25 not supposed to be possible. That is not a non-speculative

1 inference that Mendelow concluded with a high degree of  
2 certainty.

3 He might have had some suspicions but that's not  
4 the standard. A high degree of certainty, not that there's  
5 some --

6 THE COURT: Are you citing her as a source, like  
7 (indiscernible) or is this --

8 MR. REISEN: Well, I'll tell you --

9 THE COURT: I mean, I appreciate her views. But -  
10 -

11 MR. REISEN: Okay. I'll tell you why because when  
12 you look at a complaint and a judge loses all of his context  
13 and -- is what is it? That's sort of the standard of  
14 Twombly, right? That you --is this a plausible inference?  
15 Not that he had some suspicion or that it looked like there  
16 was something wrong, but a high degree of certainty that  
17 there were no securities traded, not some securities traded  
18 or there was something fraudulent or even actual knowledge  
19 that there was crimes going on. That's not enough.

20 That there was this totally unprecedented, every  
21 institution failed, it's unthinkable. And to have a high  
22 degree of certainty of that? No way. So let's talk about  
23 some of the other -- so the IRA.

24 So they say -- first of all, again, not allege  
25 that he ever looked at any of these cash balances. We're

1 just talking about inquiry knowledge. But even if he did,  
2 their reasoning is totally contradictory.

3 First, you need to hold two contradictory facts in  
4 your head, first that Mendelow and Madoff are such law  
5 abiding citizens that they would never allow -- the tax regs  
6 of allowing cash contributions or margin trading or  
7 securities additions. And at the same time they're the  
8 biggest master criminals in the world. They all know it and  
9 they all participated in it.

10 So why -- of course the inference is if he had  
11 ever seen it, which is not alleged, he would just assume,  
12 yeah, he's trading on margin. He's not supposed to be doing  
13 it. So, you know, it's just -- that is not a non-  
14 speculative inference to draw from, from the IRAs.

15 So and of course the one backdated transaction  
16 which they can find out of the millions, he's not allowed --  
17 he's not alleged to have ever seen it, so it's an inquiry  
18 knowledge. But second of all, the way this was allocated,  
19 it was always some certain. So (indiscernible - d) would  
20 have known exactly the amount and the trades would have  
21 happened already. The only question is where to allocate  
22 it.

23 Now, I want to be very clear. Mendelow calculated  
24 it twice right at the beginning. He did a very simple  
25 calculation, a percentage times a total amount plus a

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1 percentage of the referred customers. So that's all he did,  
2 twice. And he said that he wasn't constantly going through  
3 -- and then the only other thing he calls in December, he  
4 says I want my \$432 million put here and here. He's not  
5 alleged to have ever seen how it's done. All he needs to  
6 look at is the balance. It's not even a necessary step to  
7 look at any particular trade.

8 That is not a non-speculative inference to draw  
9 that. Because he did that, he said pay my referral fees and  
10 of course they're referral fees, by the way. It's Madoff --  
11 it's based on a percent of the amount given back. Madoff  
12 wants to incentivize him to get some more money in. Of  
13 course it's a referral fee. It's not some secret way to get  
14 fictitious profits.

15 So we can certainly go back to all the particular  
16 allegations here for futility and there's lots more to talk  
17 about. But I also would like to talk about the undue delay  
18 and the prejudice. I understand it's a liberal standard.  
19 It's not usually granted. This is (indiscernible)  
20 quintessential case for both undue delay and prejudice.

21 First, undue delay. It's been six year since the  
22 claim, five years since (indiscernible - c). When  
23 (indiscernible - c) came out, they knew unless they can  
24 allege actual knowledge, every claim is dismissed except for  
25 claim one.

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1           You asked me last time, well, why weren't we  
2         allowed to wait, too? The key distinction besides it being  
3         their burden is that we had no idea that this was even an  
4         option, that it was even possible. We thought it was  
5         privileged. We didn't know the possibility of amending.

6           THE COURT: -- possible.

7           MR. REISEN: We thought the choice was if  
8         (indiscernible - c) is affirmed, all the claims get  
9         dismissed. This complaint that we were facing was a pure  
10       inquiry notice. There was no even a single conclusory  
11       allegation about anything having to do with no actual  
12       securities trade or anything like that.

13           So we didn't know that we're waiting to see if  
14       they were to amend the complaint and we were consenting to  
15       allow them wait and see what they would allege about  
16       subjective -- we never knew it. And that's proven by even  
17       after -- okay so Fishman is affirmed in December. January  
18       they do their case management order. They say we're not  
19       going to amend.

20           February we have a conference. I say none of your  
21       claims are viable. We're going to move for judgment on the  
22       fees unless we can come to a settlement, we reach a  
23       settlement on this. It doesn't seem like there's -- don't  
24       even mention any possibility of amending any new  
25       allegations. Now, (indiscernible - d) is still alive at

1       that point.

2                   And then in May we have a meet and confer. We  
3       say, well, how is it possible, even plausible, non-frivolous  
4       for you to allege anything not actual knowledge? They  
5       refused to -- "we will not engage in a discussion about the  
6       facts of the law."

7                   Then in June, it's the Supreme Court denies cert,  
8       the purported reason absolutely no possibility. They still  
9       don't amend, give us any notice. The first time we hear  
10      about it is in the opposition in August of 2015. And even  
11      in December they will not tell us what possible allegations  
12      are out there.

13                  The standard is it has to be a -- it is their  
14       burden to not delay when they have the facts once they know  
15       of the pleading deficiencies. We're telling them. We're  
16       saying, what is it? They won't even engage with us about  
17       telling the -- so that's undue delay.

18                  Now prejudice, I mean, (indiscernible - d), he  
19       threw everyone under the bridge.

20                  THE COURT: But it sounds like it hurts the  
21       trustee's case more than your case. (indiscernible - d) was  
22       the guy who was going to put Mendelow in a room with him,  
23       literally, not figuratively. And now the only person who's  
24       a witness to anything is Mr. Mendelow, right?

25                  MR. REISEN: Yeah. It's not our obligation. The

1 trustee's --

2 THE COURT: How is the trustee going to prove his  
3 case?

4 MR. REISEN: We want (indiscernible - d) as our  
5 affirmative case? (indiscernible - d), probably we want to  
6 say to him, isn't it true that the prosecutors said you need  
7 to tell us everything about everyone who had actual  
8 knowledge or else you're going to lose your deal? Yes. Did  
9 you tell everyone, even people that you cared way more about  
10 than Mendelow? Yes. Did Mendelow know? No.

11 Would you have lost everything if you had lied and  
12 you know that Mendelow knew and you didn't say Mendelow --  
13 all of this stuff. What did you understand on that thing  
14 you do, which of course means the real -- you know, on that  
15 thing where you pay me referral fees -- what did that mean?  
16 We know that you --

17 THE COURT: But can't Mendelow testify to all  
18 that?

19 MR. REISEN: He can but he's biased against  
20 himself. (indiscernible - d) is biased the other way. It's  
21 additional key evidence.

22 THE COURT: But even if he's biased, if they have  
23 the burden of proof who are they going to call to prove the  
24 facts in their complaint, now that Mr. (indiscernible - d)  
25 is dead?

1                   MR. REISEN: Well, it's not just that. Obviously  
2 that's not the only factor. If that was the only factor at  
3 issue, Mendelow says no and they don't have this other  
4 stuff, then maybe. But we need (indiscernible - d).  
5 (indiscernible - d) can win the case for us. He would tell  
6 us I have all the -- I knew who knew. These are all the  
7 reasons. I knew everything. I did everything to hide it.

8                   This is how I hid it from Mendelow.

9                   THE COURT: That sounds pretty speculative. Any  
10 evidence that he would testify to that?

11                  MR. REISEN: Sure. I mean, yes. If you looked to  
12 -- well, first to fall, like I said, of course he totally  
13 opens his books, you know, his mind of everything he knows  
14 to the prosecutor. He says nothing about Mendelow knowing  
15 anything. He says about how he was successful in hiding it  
16 from people. He would have -- I'm sure but if you look at  
17 the testimony and --

18                  THE COURT: How do you know what he said to the  
19 prosecutor?

20                  MR. REISEN: Well --

21                  THE COURT: He had a transcript of his testimony  
22 at trial. How do you know what he said to the prosecutor?

23                  MR. REISEN: We know what he would say because we  
24 know Mendelow didn't know. We're entitled --

25                  THE COURT: I don't know what he said.

1                   MR. REISEN: Yes, but we're entitled to not be  
2 prejudiced to have that opportunity. If they undue delay  
3 without excuse and we're prejudiced, we need that  
4 opportunity to ask him, to say, look, (indiscernible - d),  
5 tell me all the reasons why you know that Mendelow didn't  
6 know.

7                   THE COURT: So why didn't you take his deposition  
8 when --

9                   MR. REISEN: Because we had no notice that they  
10 would ever make such a -- what we view as a frivolous  
11 allegation. We were even, again, saying how are you going  
12 to make your case? Now, they never we're going to  
13 (indiscernible) actual knowledge, that we're going to talk  
14 about (indiscernible - d). We're going to -- we had no --  
15 you know, we don't -- we can't just burn fees. We can't  
16 just also prove that Mendelow's (indiscernible) a blank  
17 check of \$1 billion.

18                  But, I mean, why didn't we take (indiscernible -  
19 d)'s deposition? We had no notice that that was even going  
20 to be necessary. We found out after he was dead. Of course  
21 we would do it now. But he was dead.

22                  We were telling them please explain to us. It's  
23 our understanding that this is -- the case is over. See  
24 what our understanding was going up to (indiscernible - c)  
25 was not that they would amend once (indiscernible - c) was

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1 affirmed but that once (indiscernible - c) was affirmed by  
2 the complaint that we're seeing we would settle or it would  
3 just be the first case.

4 We had no idea an amendment was a possible to  
5 plead actual knowledge. We thought that that would be  
6 frivolous, unethical. So we can't assume that they will do  
7 something that we view objectively as an unethical matter  
8 and start billing our client for taking depositions of  
9 people about a possibility. So that's that.

10 So let's go back a little bit to the futility.

11 THE COURT: Why don't you wrap it up? You've  
12 shown --

13 MR. REISEN: Sure, fair enough. Let me think if  
14 there's important stuff? Well, let's think about Jaffe,  
15 too, because that was mentioned.

16 Now, this same allegations against Jaffe without  
17 the amended complaint in Cohman 1 was made and it didn't  
18 even raise the inference of recklessness, the fact that he  
19 would call back and say --

20 THE COURT: The motion was denied in Cohman 2.

21 MR. REISEN: Cohman 2. Now, let's distinguish  
22 Cohman 2. First of all, it shows that -- so Mendelow,  
23 again, no evidence of subjectivity of him saying go do a  
24 backdated trade. Go execute -- he just says pay me my  
25 referral fees and however you do it.

1                   And now Jaffe "executes" a backdated trade. He  
2       says go give me some long-term gains in my account which  
3       necessarily means it's his account, which necessarily means  
4       he's committing tax fraud. Also the perfect control is that  
5       those allegations were not made against the other Cohman  
6       defendants. So that actually necessarily had no weight on  
7       the Jaffe decision because the other defendants didn't have  
8       that.

9                   THE COURT: The backdating (indiscernible) had no  
10       weight in the Cohman 2? That was the basis of deciding the  
11       actual knowledge.

12                  MR. REISEN: Well, I guess I'm saying that the --  
13       well, I thought Cohman 2 had other defendants and that was a  
14       delay against --

15                  THE COURT: Yeah, the defendants were in -- they  
16       were Madoff's partners and they had a separate set of books  
17       and records in Madoff's case.

18                  MR. REISEN: Fair enough. I guess not that it had  
19       no weight but not necessary weight.

20                  THE COURT: I think it was the ratio  
21       (indiscernible) decision.

22                  MR. REISEN: Okay. Well, let's be very clear  
23       about there was no allegation of any knowledge of backdating  
24       on Mendelow, that the fact is is that, first of all, there's  
25       no allegation that he ever saw this backdated trade, that he

1 ever directed it, ever had knowledge of it. It's pure  
2 inquiry notice.

3 Also, even if he did see it, there's no necessary  
4 -- certainly, no non-speculative inference that you get to a  
5 high degree of certainty of no securities traded that you  
6 would have had to have backdated.

7 Again, he knows the exact figure that you're going  
8 to have to give Mendelow. The only thin Mendelow does is  
9 say where he wants it. There was only twice where he  
10 calculated the fees. It was just a pure percentage times an  
11 amount. No necessary -- then again, after that, all he did  
12 was call and say, look, (indiscernible), which accounts?  
13 This one and that one. That's all. There was no necessary  
14 looking at any particular transactions. And, indeed, that  
15 is not -- they are no able to non-frivolously allege that.

16 All they can say is that he looked at his account  
17 statements because that's the only thing that's shown by  
18 both those PDFs and by the necessary calculations that he  
19 did the total times the percentage. Nothing having to do  
20 with the subjectivity, nothing even close to the  
21 relationship like in Shapiro or Cohman where they're  
22 (indiscernible) hundreds of times.

23 Mendelow never went to BLMIS. He never met him.  
24 Maybe spoke to him once. They say that he contacted him. I  
25 don't know whether that was an email, was a letter. That's

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1 the most. He didn't talk to anyone, Madoff or anyone about  
2 the inner workings of BLMIS.

3 So if the court has any other questions, I'll just  
4 leave it at that.

5 THE COURT: Okay. Thank you.

6 MR. NEW: Your Honor, I'll be very brief. First,  
7 I just want to point out that with regard to the issue of  
8 Mr. (indiscernible - d) and some of the timing of when they  
9 were on notice, you know, as we point out in our reply  
10 brief, Mr. (indiscernible - d) was identified in the  
11 original complaint as a participant in the fraud. That was  
12 at Complaint Paragraph 32.

13 Mr. Mendelow was specifically asked about his  
14 interactions with Mr. (indiscernible - d) at his rule 2004  
15 deposition. And Mr. (indiscernible - d)'s trial testimony  
16 he specifically mentioned Mr. Mendelow as a person who  
17 received a double benefit.

18 And also, Your Honor, as Mr. Reisen mentioned  
19 briefly, there was a case management order that the parties  
20 agreed on in this case in January. It wasn't something we  
21 submitted. We both stipulated to it.

22 We exchanged initial disclosures in the end of  
23 January 2015 and one of the potential witnesses for the  
24 trustee identified in those initial disclosure was Mr.  
25 (indiscernible - d), so and that was several months before

1 he passed away.

2 But, again, they have had notice of Mr.

3 (indiscernible - d) relevance to this case for quite some  
4 time, so that really is a red herring here.

5 Quickly on some of the other points, Your Honor, I  
6 would point out that, you know, when it comes to the issue  
7 of how he was being compensated with this extra P&L and what  
8 he knew, a lot of what Mr. Reisen just stated here was  
9 theory, speculation, alternative facts, as Your Honor  
10 pointed out, that are not in the complaint.

11 Obviously they can pursue those theories, they can  
12 try to develop those facts in discovery but the complaint as  
13 it stands right now makes it very clear how Mr. Mendelow  
14 received this extra P&L. It was through these fictitious  
15 option transactions. There were no allegations that -- and  
16 I'm not aware of any facts that suggest that Mr. Madoff or  
17 BLMIS had some other pool of securities that they somehow  
18 allocated into his account. There's nothing in the  
19 complaint that supports that.

20 And I would point out, Your Honor, that what the  
21 complaint does say very clearly is that on the account  
22 statements and in Mr. Mendelow's own handwritten  
23 calculations, there were no securities that were contributed  
24 to his account. So it's simply not the fact based on the  
25 allegations in the complaint which need to be accepted as

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1 true at this point, that Mr. Mendelow could have believed  
2 that he was getting securities transferred into his account  
3 that were coming from some other source because there's no  
4 evidence that that actually happened either on his account  
5 statements or in his own calculations.

6 In any event, the question before the court at  
7 this time is whether this is a plausible inference that Mr.  
8 Mendelow knew that these were fictitious option transactions  
9 in his accounts, not whether it's the only plausible  
10 interest, not whether it's the most plausible inference, but  
11 whether or not the facts alleged and the inferences to be  
12 drawn from them raised a plausible claim for relief.  
13 Discovery can sort out the rest of it.

14 With regard to the IRA, Your Honor, I don't think  
15 that Mr. Reisen quite understands what the argument is here.  
16 I assume that the court does.

17 The argument is not that there were margin trades  
18 in the account. It's not that he should have looked at the  
19 statements and seen that there were margin trades in the  
20 account. The argument is is that he specifically directed  
21 that he be getting extra value in his IRA accounts in a  
22 preset amount, that that was accomplished through fictitious  
23 option transactions and that was the only way that it could  
24 have been accomplished, through gains on transactions.

25 Mr. Mendelow is a sophisticated accountant; he's a

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1 sophisticated financial professional. The allegations in  
2 the claim are sufficient to show that he knew that he was  
3 being compensated at his direction, at his request in  
4 transactions in that account.

5 And finally, with regard to Jaffe, Your Honor, I  
6 don't want to beat a dead horse, but --

7 THE COURT: But you will.

8 MR. NEW: Yeah, I will, just very briefly just to  
9 provide citations to the court in case the court doesn't  
10 have it.

11 In the actual Cohman decision, 2013 US District  
12 Lexis 56042 at 38 to 39, the allegations that were relied  
13 upon by Judge Rakoff are that Jaffe request to Madoff  
14 Securities "a long-term gain of approximately \$600,000 for  
15 one of the accounts he controlled in response to which  
16 Madoff Securities executed a sale of Etna stock on the day  
17 before the request." That's the sum total of the  
18 allegations and that's comparable to what we've alleged here  
19 with regards to that one backdated trade.

20 Unless Your Honor has any further questions about  
21 the amendment, I would just like to briefly raise the  
22 housekeeping matter that's also on the calendar for today.

23 THE COURT: Go ahead.

24 MR. NEW: You know, the parties have discussed  
25 this prior to court today and I believe that we've agreed on

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1 a stipulation that we'll submit to the court this afternoon  
2 which will ask the court to so-order the stipulation that  
3 the case management -- the dates in the case management  
4 order are being held in abeyance pending the court's  
5 determination on this motion and the defendant's motion and  
6 that upon determination by the court on those motions the  
7 parties will agree upon new dates to be proposed to the  
8 course in an amended case management order.

9 THE COURT: All right.

10 MR. REISEN: If I may just address what he said.

11 THE COURT: No. I'll reserve decision. But what  
12 I would like is a copy of the 2004 transcript and those  
13 questions and answers you want me to read.

14 MR. NEW: Yes, Your Honor. We will do so.

15 THE COURT: And you can tell me any questions and  
16 answers you want me to read also, Mr. Reisen. Thank you  
17 very much.

18 MR. NEW: Thank you, Your Honor.

19 THE COURT: Thank you.

20 (Whereupon these proceedings were concluded at  
21 12:07 PM)

22

23

24

25

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1 C E R T I F I C A T I O N

2

3 I, Sonya Ledanski Hyde, certified that the foregoing  
4 transcript is a true and accurate record of the proceedings.

5

6 Sonya  
7 Ledanski Hyde

  
Digitally signed by Sonya Ledanski  
Hyde  
DN: cn=Sonya Ledanski Hyde, o, ou,  
email=digital1@veritext.com, c=US  
Date: 2016.03.03 14:00:06 -05'00'

8 Sonya Ledanski Hyde

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25 Date: February 25, 2016

[&amp; - account]

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